United States Court of Appeals

for the Second Circuit

APPENDIX

77-4078

United States Court of Appeals

For The Second Circuit

Docket No. 77-4078

SCM CORPORATION,

Petitioner,

—against—

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION FOR REVIEW OF A
FINAL ORDER OF THE FEDERAL TRADE COMMISSION

JOINT APPENDIX

WILLIAM E. WILLIS
JAMES E. TYRRELL
Sullivan & Cromwell
48 Wall Street
New York, New York 10005
(212) 952-8100

MILTON WOLSON
SCM Corporation

Attorneys for Petitioner
SCM Corporation

MICHAEL N. SOHN
General Counsel
GERRALD P. NORTON
Deputy General Counsel
JEROLD D. CUMMINS
Acting Assistant General Counsel
DAVID C. SHONKA
Attorney
Federal Trade Commission
Washington, D.C. 20580
(202) 523-3442

Attorneys for Respondent
Federal Trade Commission

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

Docketed: June 17, 1975

In the matter of KRAFTCO CORPORATION, et al

RESPONDENTS

Kraftco Corporation
Kraftco Court, Glenview, Illinois 60025

SCM Corporation
299 Park Avenue, New York, N. Y. 10017

Richard C. Bond, Indiv.
412 Caversham Road
Bryn Mawr, Pa. 19008

The Attorney General
Department of Justice
Washington, D. C. 20580

Attn: William W. Swope

Act:
F.T.C.
Clayton 8

Charge—Commodity—Trade Name:
Restraint of trade -

Margarine, Salad and Cooking Oils -

FEDERAL TRADE COMMISSION
COMPLAINTS

Complaint Served	Answer Filed	Initial Decision Served	Commission Decision Served	Compliance Report Filed
	11-18-75	7-8-76	9-23-76	
	11-20-75	7-8-76	9-22-76	
		7-7-76	9-23-76	7-30-76

Hearings:
Washington, D. C. - December 19, 1975 - 1 - 74
(Oral Argument) - November 10, 1976 - 1 - 59

6-17-76	Initial Decision Filed
1-11-77	Final Order Adopting pages 1 through 18 of the administrative law judge's initial decision as the findings of fact and conclusions of law of the Commission; vacating the remainder and substituting supplementary findings of fact and conclusions of law contained in the Opinion by the Commission) and order to cease and desist and to file report of compliance as to respondent (2).
9-9-76	Decision and Order Adopting agreement based on consent order to cease and desist and order to file report of compliance as to respondent (1)
4-26-76	Decision and Order Adopting agreement based on consent order to cease and desist as to respondent (3).

COURT PROCEEDINGS

ATTORNEYS

Chadwell, Kayser, Ruggles, McGee & Hastings
135 South LaSalle Street, Suite 2360, Chicago, Ill 60603
Attn: David C. Bogan
C. Lee Cook, Jr.
(1)

Howard Hoosin
William G. Taffe
Kraftco Court, Glenview, Illinois 60025

(1)

Sullivan & Cromwell
48 Wall Street, New York, N. Y. 10005
Attn: William E. Willis

(2)

Ballard, Spahr, Andrews & Ingersoll
~~Land Title Building, Phila, Pa. 19110~~
Attn: Frederic L. Ballard
United Engineers Building, 20th Floor
30 South 17th Street, Phila., Pa. 19103 (3)

Administrative Law Judge:
M. Needleman -

Counsel Supporting Complaint:
R. A. Bloch -
C. Batterton -
J. Tasker, Jr. -

HISTORY

	Initial hearing set for: August 8, 1975, at 10:00 a.m. Washington, D. C. Federal Trade Commission Offices 1101 Building, 11th & Pennsylvania, Ave., N.W.
6-17-75	Complaint Issued. Served: Chadwell, Kayser, Ruggles, McGee & Hastings - 7-21-75 Howard Hoosin - 7-21-75
6-17-75	Order by Chief Administrative Law Judge appointing administrative law judge M. Needleman. (served with complaint)

SKELETON

9035-1 Pleadings, etc.
9035-1-1 Pleadings, etc.
1-2 Interlocutory

HISTORY

8-1-75	Administrative law judge's order cancelling initial hearing scheduled for August 8, 1975, sugject to rescheduling on ten (10) days notice. Served: Chadwell, Kayser, Ruggles, McGee & Hastings - 8-7-75 Howard Hoosin - 8-7-75
8-7-75	Administrative law judge's order extending time to September 30, 1975 to respondents to answer or file other responsive pleadings. Served: Chadwell, Kayser, Ruggles, McGee & Hastings - 8-11-75 Howard Hoosin - 8-11-75
9-25-75	Motion by respondent (1) for an extension of time to October 30, 1975, within which to answer, with certificate of service.
9-29-75	Motion by respondent (2) for an extension of time to October 30, 1975, within which to answer, with certificate of service.
9-29-75	Administrative law judge's order granting respondents a further extension of time to October 30, 1975, to file a response to the complaint. Served: Chadwell, Kayser, Ruggles, McGee & Hastings - 10-3-75 Howard Hoosin - 10-3-75 Sullivan & Cromwell - 10-2-75
10-30-75	Motion by respondent (1) for an extension of time to December 1, 1975, within which to answer the complaint, with certificate of service.
10-30-75	Motion by respondent (2) for an extension of time to November 28, 1975, within which to answer the complaint, with certificate of service.
10-30-75	Answer by counsel supporting complaint in opposition to motion by respondent (2) for an extension of time within which to answer the complaint. Mailed: Chadwell, Kayser, Ruggles, McGee & Hastings Howard Hoosin Sullivan & Cromwell
10-31-75	Agreement containing consent order to cease and desist as to rexpondent (3).
11-3-75	Administrative law judge's order granting final extension of time to November 17, 1975 to respondents to file answers to the complaint. Served: Chadwell, Kayser, Ruggles, McGee & Hastings - 11-6-75 Howard Hoosin - 11-6-75 William G. Taffe - 11-6-75 Sullivan & Cromwell - 11-5-75 Ballard, Spahr, Andrews & Ingersoll - 11-14-75

11-18-75	Answer filed by respondent (1), with certificate of service.
11-19-75	Motion by counsel supporting complaint to note the default of and enter an order to cease and desist against respondent (2) with proposed order attached. Served: Chadwell, Kayser, Ruggles, McGee & Hastings - 11-24-75 Howard Hoosin - 11-24-75 Sullivan & Cromwell - 11-21-75 Ballard, Spahr, Andrews & Ingersoll - 11-21-75
11-20-75	Answer filed by respondent (2), with certificate of service.
11-20-75	Motion by respondent (2) for summary decision dismissing the complaint, with affidavit, certificate of service and exhibit A.
11-20-75	Memorandum of law by respondent (2) in support of its motion for summary decision dismissing the complaint.
11-20-75	Joint motion by counsel supporting complaint and counsel for respondent (3) for withdrawal from adjudication and certification.
11-21-75	Administrative law judge's certification of joint motion by counsel supporting complaint and counsel for respondent (3) for withdrawal from adjudication to consider a proposed consent settlement. Served: Chadwell, Kayser, Ruggles, McGee & Hastings - 11-26-75 Howard Hoosin) 11-26-75 William G. Taffe) 11-26-75 Sullivan & Cromwell - 11-28-75 Ballard, Spahr, Andrews & Ingersoll - 11-25-75 (Continued on Sheet 1b)
11-21-75	Administrative law judge's order denying motion by counsel supporting complaint for default. Served: Chadwell, Kayser, Ruggles, McGee & Hastings - 11-26-75 Howard Hoosin) 11-26-75 William G. Taffe) 11-26-75 Sullivan & Cromwell - 11-26-75 Ballard, Spahr, Andrews & Ingersoll - 11-25-75
11-21-75	Administrative law judge's prehearing order No. 1 directing that a prehearing conference be held on December 19, 1975 at 10:00 a.m. in Room 7314, The 1101 Building, 414 - 11th Street, N. W., Washington, D. C. At that time, oral argument will be heard on motion by respondent (2) for summary decision. In addition, to avoid unnecessary expense in holding multiple prehearing conferences, the parties should be prepared to discuss both prehearing procedures and the setting of an early trial date should the motion for summary decision be denied. Served: Chadwell, Kayser, Ruggles, McGee & Hastings - 11-26-75 Howard Hoosin) 11-26-75 William G. Taffe) 11-26-75 Sullivan & Cromwell - 11-26-75 Ballard, Spahr, Andrews & Ingersoll - 11-25-75

11-25-75	Affidavit of Marcia B. Paul, with certificate of service and exhibits A, B, and C attached.
12-1-75	Answer by counsel supporting complaint in opposition to motion by respondent (2) for summary decision dismissing the complaint, with memorandum in support, affidavit of Joseph Tasker, Jr., and attachments. Mailed: Chadwell, Kayser, Ruggles, McGee & Hastings Howard Hoosin) William G. Taffe) Sullivan & Cromwell Ballard, Spahr, Andrews & Ingersoll
12-1-75	Motion by counsel supporting complaint for summary decision in their favor and entry of an order to cease and desist against respondent (1) and respondent (2), with affidavit of Joseph Tasker, Jr., attachments and proposed orders. Served: Chadwell, Kayser, Ruggles, McGee & Hastings - 12-4-75 Howard Hoosin) 12-4-75 William G. Taffe) 12-4-75 Sullivan & Cromwell - 12-4-75 Ballard, Spahr, Andrews & Ingersoll - 12-3-75
12-9-75	Proposal by respondent (1) for additions to prehearing conference agenda, with certificate of service.
12-10-75	Motion by respondent (1) for an extension of time to January 9, 1976, within which to respond to motion by counselsupporting complaint for summary decision, with certificate of service.
12-12-75	Opposition by counsel supporting complaint to motion by respondent (1) for an extension of time in which to respond to motion for summary decision. Mailed: Chadwell, Kayser, Ruggles, McGee & Hastings Howard Hoosin) William G. Taffe) Sullivan & Cromwell Ballard, Spahr, Andrews & Ingersoll
12-12-75	Administrative law judge's prehearing order No. 2 directing that motion by respondent (1) for an extension of time to file a response to motion by counsel supporting complaint for summary decision will be denied in its present form, further directing that the due date for the response be stayed until December 19, 1975, when respondent (1) may indicate orally on the record during the prehearing conference its position respecting the motion by counsel supporting complaint for summary decision, also directing that respondent (1) have until Wednesday, December 24, 1975, to file a written response to motion by counsel supporting complaint. Served: Chadwell, Kayser, Ruggles, McGee & Hastings - 12-7-75 Howard Hoosin) 12-18-75 William G. Taffe) 12-18-75 Sullivan & Cromwell - 12-17-75 Ballard, Spahr, Andrews & Ingersoll - 12-16-75

12-15-75	Affidavit of Richard Sexton, with exhibit A.
12-15-75	Memorandum of law by respondent (2) in opposition to the motion by counsel supporting complaint for summary decision, dated December 1, 1975, and further support of its motion for summary decision, with certificate of service.
12-19-75	Order withdrawing matter from adjudication for settlement purposes as to respondent (3). (Commissioners Engman, Dixon and Nye voted in the affirmative and Commissioner Hanford was recorded as voting in the affirmative) Served: Kraftco Corporation - 1-5-76 SCM Corporation - 1-5-76 Richard C. Bond - 1-5-76 Chadwell, Kayser, Ruggles, McGee & Hastings - 1-2-76 Howard Hoosin) 1-5-76 William G. Taffe) 1-5-76
12-22-75	Administrative law judge's prehearing order No. 3, granting an extension of time to January 19, 1976 to the parties to file their documents re consent settlement and briefs re pending motion for summary decision. Served: Chadwell, Kayser, Ruggles, McGee & Hastings - 12-29-75 Howard Hoosin) 12-29-75 William G. Taffe) 12-29-75 Sullivan & Cromwell - 12-29-75 Ballard, Spahr, Andrews & Ingersoll - 12-29-75
1-13-76	Motion by counsel supporting complaint for a sixty (60) day extension of time within which to enter into a stipulation with respondent (2), with attachments. Served: Chadwell, Kayser, Ruggles, McGee & Hastings - 1-16-76 Howard Hoosin) 1-19-76 William G. Taffe) 1-19-76 Sullivan & Cromwell - 1-16-76 Ballard, Spahr, Andrews & Ingersoll - 1-14-76
1-14-76	Administrative law judge's prehearing order No. 4 directing that all deadlines listed in prehearing order No. 3 are extended from January 19, 1976, to March 19, 1976 to file a stipulated record. Served: Chadwell, Kayser, Ruggles, McGee & Hastings - 1-19-76 Howard Hoosin) 1-19-76 William G. Taffe) 1-19-76 Sullivan & Cromwell - 1-19-76 Ballard, Spahr, Andrews & Ingersoll - 1-19-76
1-23-76	Joint motion by counsel supporting complaint and counsel for respondent (1) for withdrawal from adjudication and certification.
1-23-76	Agreement containing consent order to cease and desist as to respondent (1). (Continued on reverse side of sheet)

1-26-76	Administrative law judge's certification to the Commission of joint motion by counsel supporting complaint and respondent (1) for withdrawal from adjudication for the purpose of considering consent agreement. Served: Chadwell, Kayser, Ruggles, McGee & Hastings - 1-29-76 Howard Hoosin) 1-29-76 William G. Taffe) 1-29-76 Sullivan & Cromwell - 1-29-76 Ballard, Spahr, Andrews & Ingersoll - 1-29-76
2-3-76	Order withdrawing matter from adjudication as to respondent (1). (Commissioners Dixon, Dole and Nye voted in the affirmative) Served: Kraftco Corporation - 2-9-76 SCM Corporation - 2-6-76 Richard C. Bond - 2-9-76 Chadwell, Kayser, Ruggles, McGee & Hastings - 2-9-76 Howard Hoosin) 2-9-76 William G. Taffe) 2-9-76 Sullivan & Cromwell - 2-9-76 Ballard, Spahr, Andrews & Ingersoll - 2-6-76
3-17-76	Joint motion by counsel supporting complaint and counsel for respondent (2) for a thirty-one (31) day extension of time from March 19, 1976 to April 19, 1976, within which to enter into stipulation of fact.
3-18-76	Administrative law judge's prehearing order No. 5 granting an extension of time until April 19, 1976 to counsel supporting complaint and respondent (2) in which to submit a stipulation of fact. Served: Chadwell, Kayser, Ruggles, McGee & Hastings - 3-24-76 Howard Hoosin) 3-24-76 William G. Taffe) 3-24-76 Sullivan & Cromwell - 3-23-76 Ballard, Spahr, Andrews & Ingersoll - 3-23-76
4-14-76	Administrative law judge's order directing that this matter will be submitted for initial decision on the basis of a factual stipulation to be filed by the parties on April 29, 1976, further directing that with the filing of this stipulation, the record will be closed for the reception of evidence, also idrecting that thereafter, the parties are to brief this matter according to the following schedule: proposed findings and main briefs will be filed simultaneously on May 10, 1976; reply findings and answering briefs will be filed on May 10, 1976; upon review of the briefs and findings, the administrative law judge will determine whether oral argument will be useful. Served: Chadwell, Kayser, Ruggles, McGee & Hastings - 4-19-76 Howard Hoosin) 4-19-76 William G. Taffe) 4-19-76 Sullivan & Cromwell - 4-16-76 Ballard, Spahr, Andrews & Ingersoll - 4-19-76
4-26-76	Decision and Order Adopting agreement based on consent order to cease and desist and order to file report of compliance as to respondent (3) (Commissioners Collier, Dixon, Dole and Nye voted in the affirmative) Served:

	Chadwell, Kayser, Ruggles, McGee & Hastings - 5-17-76 Howard Hoosin) 5-18-76 William G. Taffe) 5-18-76 Sullivan & Cromwell - 5-14-76 Ballard, Spahr, Andrews & Ingersoll - 5-17-76
4-29-76	Joint stipulation of facts submitted by counsel supporting complaint and counsel for respondent (2), with exhibits A and B attached.
5-10-76	Proposed findings of fact, conclusions of law and order submitted by respondent (2).
5-10-76	Memorandum of law submitted by respondent (2)
5-10-76	Proposed findings of fact and conclusions of law filed by counsel supporting complaint. Mailed: Chadwell, Kayser, Ruggles, McGee & Hastings Howard Hoosin) William G. Taffe) Sullivan & Cromwell Ballard, Spahr, Andrews & Ingersoll
5-10-76	Supplementary memorandum of law by counsel supporting complaint in support of their motion for summary decision and in opposition to motion by respondent (2) to dismiss. Mailed: Chadwell, Kayser, Ruggles, McGee & Hastings Howard Hoosin) William G. Taffe) Sullivan & Cromwell Ballard, Spahr, Andrews & Ingersoll
5-21-76	Administrative law judge's order amending final order of April 13, 1976, and without objection by respondent (2), the date for the filing of reply findings and answering briefs is changed to June 3, 1976 Served: Chadwell, Kayser, Ruggles, McGee & Hastings - Howard Hoosin) 5-26-76 William G. Taffe) 5-26-76 Sullivan & Cromwell - Ballard, Spahr, Andrews & Ingersoll - 5-27-76
6-3-76	Reply findings of fact and conclusions of law and memorandum of law submitted by counsel supporting complaint in response to "Memorandum of law by respondent (2)", with proposed order attached. Mailed: Chadwell, Kayser, Ruggles, McGee & Hastings Howard Hoosin) William G. Taffe) Sullivan & Cromwell Ballard, Spahr, Andrews & Ingersoll
6-3-76	Reply memorandum of law by respondent (2).
6-4-76	Administrative law judge's final order directing that counsel on both sides have adequately briefed this case, and that no oral argument will be necessary. Served: Chadwell, Kayser, Ruggles, McGee & Hastings - 6-10-76 Howard Hoosin) 6-10-76 William G. Taffe) 6-10-76 Sullivan & Cromwell - 6-10-76 Ballard, Spahr, Andrews & Ingersoll - 6-10-76

6-17-76	Administrative law judge's initial decision and order to cease and desist, as to respondent (2). Served: CSC - R. A. Bloch - CSC - C. Batterton - CSC - J. Tasker - Chadwell, Kayser, Ruggles, McGee & Hastings - Howard Hoosin) 7-8-76 William G. Taffe) 7-8-76 Sullivan & Cromwell - 7-8-76 Ballard, Spahr, Andrews & Ingersoll - 7-9-76
7-13-76	Notice by respondent (2) of intention to appeal the administrative law judge's initial decision.
7-30-76	Report of compliance filed as to respondent (3).
8-4-76	Motion by respondent (2) for a three (3) week extension of time to and including August 30, 1976 to file a brief on appeal from the initial decision of the administrative law judge.
8-5-76	Response by counsel supporting complaint to motion by respondent (2) for a three week extension of time to file brief on appeal from the administrative law judge's initial decision. Mailed: Chadwell, Kayser, Ruggles, McGee & Hastings Howard Hoosin) William G. Taffe) Sullivan & Cromwell Ballard, Spahr, Andrews & Ingersoll
8-5-76	Order extending time to August 16, 1976 to respondent (2) to file appeal brief. Served: Chadwell, Kayser, Ruggles, McGee & Hastings - Howard Hoosin) William G. Taffe) Sullivan & Cromwell - Ballard, Spahr, Andrews & Ingersoll -
8-16-76	Brief by respondent (2) - Appeal from administrative law judge's initial decision, with exhibits A and B attached.
8-20-76	Amendment by respondent (2) correcting a typographical error on page three (3) of its brief on appeal from the administrative law judge's initial decision, with page three attached.
9-9-76	Decision and Order Adopting agreement based on consent order to cease and desist and order to file report of compliance, as to respondent (1). (Commissioners Collier, Dixon and Clanton voted in the affirmative, Commissioner Dole did not participate) Served: Chadwell, Kayser, Ruggles, McGee & Hastings - Howard Hoosin) William G. Taffe) Sullivan & Cromwell - Ballard, Spahr, Andrews & Ingersoll -

9-13-76	Notice that oral argument upon appeal by counsel for respondent (2) from the administrative law judge's initial decision has been set for Wednesday, November 10, 1976 at 2:00 p.m. in the Hearing Room, Federal Trade Commission Building, Washington, D. C. Served: Chadwell, Kayser, Ruggles, McGee & Hastings - 9-20-76 Howard Hoosin) 9-20-76 William G. Taffe) 9-20-76 Sullivan & Cromwell - 9-17-76 Ballard, Spahr, Andrews & Ingersoll - 9-16-76
9-16-76	Brief by counsel supporting complaint - Answer to appeal by respondent (2) from the administrative law judge's initial decision, with appendix A. Mailed: Chadwell, Kayser, Ruggles, McGee & Hastings Howard Hoosin) William G. Taffe) Sullivan & Cromwell Ballard, Spahr, Andrews & Ingersoll
9-27-76	Brief by respondent (2) - Reply on appeal from administrative law judge's initial decision.
11-10-76	Oral argument on appeal by respondent (2) from the administrative law judge's initial decision.
12-8-76	Order requiring additional briefing by the parties as to certain questions raised in the IBM order and directing that the parties shall submit memoranda within fifteen (15) days from receipt of this order. (Commissioners Collier, Dixon, Dole and Clanton voted in the affirmative) Served: SCM Corporation - Chadwell, Kayser, Ruggles, McGee & Hastings - Howard Hoosin) William G. Taffe) Sullivan & Cromwell - Ballard, Spahr, Andrews & Ingersoll -
12-23-76	Response by counsel supporting complaint to order by the Commission requiring additional briefing. Mailed: Chadwell, Kayser, Ruggles, McGee & Hastings Howard Hoosin) William G. Taffe) Sullivan & Cromwell Ballard, Spahr, Andrews & Ingersoll
12-27-76	Memorandum by respondent (2) in response to order by the Federal Trade Commission requiring additional briefing.
1-11-77	Order denying appeal by counsel for respondent (2) from the administrative law judge's initial decision. (Contained in Final Order)

1-11-77	Final Order (Adopting pages 1 through 18 of the administrative law jduge's initial decision as the findings of fact and conclusions of law of the Commission; vacating the remainder and substituting supplementary findings of fact and conclusions of law contained in the Opinion by the Commission) and order to cease and desist and to file report of compliance as to respondent (2). Statement - Collier - Concurrence - attached Opinion - Commission - attached (Commissioners Collier, Dixon, Dole and Clanton voted in the affirmative) Served: Chadwell, Kayser, Ruggles, McGee & Hastings - Howard Hoosin) William G. Taffe) Sullivan & Cromwell - Ballard, Spahr, Andrews & Ingersoll -
3-24-77	Petition to review.....(filed by SCM Corporation) (For Court action see Sheet 2)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

	No. 77-4078 Attorney: William E. Willis Sullivan & Cromwell 48 Wall Street New York, New York 10005
3-24-77	Petition for review of the order to cease and desist filed by SCM Corporation.

UNITED STATES OF AMERICA

BEFORE

FEDERAL TRADE COMMISSION

DOCKET NO. 9035

IN THE MATTER OF:

KRAFTCO, INC., et al

COMPLAINT

6-12-25

FTC 4-524-1

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of KRAFTCO, INC., a corporation, SCM CORPORATION, a corporation, and RICHARD C. BOND, an individual.	DOCKET NO. 9035

COMPLAINT

The Federal Trade Commission, having reason to believe that the above named respondents have been and are in violation of the provisions of Section 8 of the Clayton Act, as amended, and Section 5(a)(1) of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, issues its complaint, stating its charges as follows:

PARAGRAPH ONE: Respondent Kraftco, Inc. (hereinafter "Kraftco") is a Delaware corporation, and maintains its principal office at Kraftco Court, Glenview, Illinois 60025. Kraftco has capital, surplus, and undivided profits aggregating more than one million dollars, and is engaged in whole or in part in commerce as "commerce" is defined in Section 1 of the Clayton Act and Section 4 of the Federal Trade Commission Act.

PARAGRAPH TWO: Respondent SCM Corporation (hereinafter "SCM") is a New York corporation, and maintains its principal office at 299 Park Ave., New York, New York 10017. SCM has capital, surplus, and undivided profits aggregating more than one million dollars, and is engaged in whole or in part in commerce as "commerce" is defined in Section 1 of the Clayton Act and Section 4 of the Federal Trade Commission Act.

PARAGRAPH THREE: Respondent Richard C. Bond is a resident of the Commonwealth of Pennsylvania.

PARAGRAPH FOUR: Respondent Bond is a member of the Board of Directors of each of the herein named corporate respondents.

PARAGRAPH FIVE: The business of the corporate respondents, Kraftco and SCM, includes the manufacture and sale in commerce of margarine, edible oils, and barbecue sauce.

PARAGRAPH SIX: Kraftco and SCM, by the nature of their margarine, edible oil, and barbecue sauce business and location of operations with respect to said products, are competitors of each other. The elimination of competition with respect thereto by agreement between Kraftco and SCM would constitute a violation of the antitrust laws.

PARAGRAPH SEVEN: Therefore, the simultaneous presence of respondent Richard C. Bond on the Board of Directors of respondents Kraftco and SCM constitutes a violation of Section 8 of the Clayton Act and Section 5(a)(1) of the Federal Trade Commission Act.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission, on this 17th day of June, 1975, issues its complaint against said respondents.

NOTICE

Notice is hereby given to each of the respondents hereinbefore named that the 8th day of August A.D. 1975, at 10:00 o'clock is hereby fixed as the time and Federal Trade Commission, 1101 Building, 11th & Pennsylvania Avenue, N.W., Washington, D.C. 20580 as the place when and where a hearing will be had before an administrative law judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the administrative law judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the administrative law judge, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceeding in this matter that the Respondents, Kraftco, SCM, and Richard C. Bond are in violation of the law as alleged in the Complaint, the Commission may order such relief as is supported by the record and is necessary and appropriate, including, but not limited to:

1. Requiring the resignation of Richard C. Bond from the Board of Directors of one of the corporate respondents.

2. Prohibiting both of the corporate respondents from having any common director with each other or with any other corporation with whom either competes.

3. Prohibiting Richard C. Bond from simultaneously serving on the Boards of Directors of any corporations which compete with each other.

4. Requiring the corporate respondents to obtain reports from each of their directors and potential directors showing the products and services produced and/or sold by each other corporation which each serves as a director.

5. Submitting to the Commission periodic compliance reports.

6. Notifying the Commission of any proposed corporate changes which might affect compliance obligations under the order.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this Complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this 17th day of June , A.D., 1975 .

By the Commission.

Chas. A. Tobin

Charles A. Tobin,
Secretary.

S E A L

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

KRAFTCO, INC.,
a corporation,

SMC CORPORATION,
a corporation,

and

RICHARD C. BOND,
an individual.

DOCKET NO. 9035

ORDER DESIGNATING ADMINISTRATIVE LAW JUDGE

Pursuant to authority vested in the Federal Trade Commission and delegated to the Chief Administrative Law Judge,

IT IS ORDERED that Morton Needelman, an administrative law judge of this Commission, be, and he hereby is, designated and appointed to take testimony and receive evidence in this proceeding and to perform all other duties authorized by law.

Daniel H. Hanscom
Chief Administrative Law Judge

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of KRAFTCO, INC., a corporation, SCM CORPORATION, a corporation, and RICHARD C. BOND, an individual.	DOCKET NO. 9035

ANSWER OF KRAFTCO CORPORATION

Respondent Kraftco Corporation ("Kraftco"), by its attorneys, answers the complaint as follows:

1. Kraftco denies the allegations of the introductory unnumbered paragraph of the complaint that the Federal Trade Commission has or had reason to believe that Kraftco has been or is in violation of the provisions of Section 8 of the Clayton Act, as amended, and Section 5(a)(1) of the Federal Trade Commission Act and that any proceeding against Kraftco would be in the public interest.

2. Kraftco admits the allegations of Paragraph One except to state that its true corporate name is Kraftco Corporation and not "Kraftco, Inc." as alleged in the Caption and Paragraph One of the complaint.

3. Kraftco neither admits nor denies the allegations of Paragraph Two since Paragraph Two does not pertain to Kraftco and Kraftco is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph Two.

4. Kraftco neither admits nor denies the allegations of Paragraph Three since Paragraph Three does not pertain to Kraftco and Kraftco is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph Three.

5. With respect to the allegations in Paragraph Four, Kraftco admits that respondent Richard C. Bond ("Bond") has been in the past a member of the Board of Directors of Kraftco and a member of the Board of Directors of respondent SCM Corporation ("SCM"); Kraftco admits that Bond is presently a member of the Board of Directors of Kraftco; Kraftco denies that Bond is presently a member of the Board of Directors of SCM.

6. Kraftco admits the allegations in Paragraph Five that the business of Kraftco includes the manufacture and sale of margarine, edible oils and barbecue sauce in commerce; Kraftco is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph Five that the business of SCM includes the manufacture and sale of margarine, edible oils and barbecue sauce in commerce.

7. Kraftco denies the allegations of Paragraph Six that Kraftco and SCM, by the nature of their margarine, edible oils and barbecue sauce business and the location of such operations, are competitors of each other. Because of the ambiguous and purely hypothetical nature of the allegations in the second sentence of Paragraph Six, Kraftco does not believe any response is necessary to such allegations but to the extent any meaningful response can be made to such allegations Kraftco denies each and all of them.

8. With respect to the allegations in Paragraph Seven, Kraftco denies that Bond is presently serving on the Board of Directors of Kraftco and SCM; Kraftco denies that the simultaneous presence of Bond on the Board of Directors of both Kraftco and SCM would constitute a violation of Section 8 of the Clayton Act and Section 5(a)(1) of the Federal Trade Commission by Kraftco; and Kraftco denies that having Bond serve on Kraftco's Board of Directors has or will in any manner constitute a violation of Section 8 of the Clayton Act or Section 5(a)(1) of the Federal Trade Commission Act by Kraftco.

First Affirmative Defense

9. Kraftco avers that the complaint fails to state a claim upon which relief can be granted against Kraftco.

Second Affirmative Defense

10. Kraftco avers that Section 8 of the Clayton Act by its express terms applies only to individuals and cannot be violated by a corporation. Kraftco further avers that Section 5(a)(1) of the Federal Trade Commission Act does not incorporate Section 8 of the Clayton Act or otherwise make it applicable to corporations and thus the conduct alleged in the complaint, even if true, would not constitute a violation by Kraftco of Section 5(a)(1) of the Federal Trade Commission Act.

Third Affirmative Defense

11. Kraftco avers that in the course of the investigation which led to the issuance of the complaint in this matter, the Federal Trade Commission, and those conducting the investigation for it, violated Rule 2.6 of the Federal Trade Commission Procedures and Rules of Practice (16 C.F.R. § 2.6) in failing to notify Kraftco of the purpose and scope of the investigation, thus depriving Kraftco of the opportunity to voluntarily correct any alleged violation of any of the statutes administered by the Federal Trade Commission. The Federal Trade Commission's action as herein alleged constituted an abuse of the administrative process in violation of the Administrative Procedure Act and denied

Kraftco the due process of law guaranteed by the Fifth Amendment to the United States Constitution.

Fourth Affirmative Defense

12. Kraftco avers that subsequent to the issuance of the complaint in this matter, Bond resigned from the SCM Board of Directors while remaining on Kraftco's Board of Directors. Bond's resignation renders any cause of action which might have been alleged in the complaint entirely moot. There is no reasonable expectation that any interlocking directorate involving Kraftco will ever occur in the future.

WHEREFORE, respondent Kraftco Corporation requests that the complaint be dismissed as to this respondent.

KRAFTCO CORPORATION

by C. Lee Cook, Jr.

C. Lee Cook, Jr.
David C. Bogan
Chadwell, Kayser, Ruggles,
McGee & Hastings
135 South LaSalle Street
Chicago, Illinois 60603

Howard Hoosin
William G. Taffe
Kraftco Court
Glenview, Illinois 60025

Attorneys for Kraftco Corporation

November 14, 1975

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Answer of Kraftco Corporation were served upon all counsel of record by mail on the 14th day of November, 1975.

Counsel for Respondent SCM Corporation

William E. Willis, Esq.
Sullivan & Cromwell
48 Wall Street
New York, New York 10005

Counsel for Respondent Richard C. Bond

Frederic L. Ballard, Esq.
Ballard, Spahr, Andrews & Ingersoll
Land Title Building
Philadelphia, Pennsylvania 19110

Counsel Supporting the Complaint

Clint Batterton, Esq.
Federal Trade Commission
Washington, D. C. 20580

David C. Bogan

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

In the Matter of	:	
KRAFTCO, INC., a corporation,	:	
	:	Docket No. 9035
SCM CORPORATION, a corporation,	:	
and	:	
RICHARD C. BOND, an individual	:	ANSWER
	:	

Respondent SCM Corporation ("SCM"), as and for its answer to the complaint in the above-captioned proceeding, alleges as follows:

PARAGRAPH ONE: Denies knowledge or information sufficient to form a belief as to the allegations of paragraph one of the complaint.

PARAGRAPH TWO: Admits the allegations of paragraph two of the complaint.

PARAGRAPH THREE: Admits on information and belief the allegations of paragraph three of the complaint.

PARAGRAPH FOUR: Denies that respondent Bond is a member of the Board of Directors of respondent SCM, admits that prior to August 1, 1975 respondent Bond was a member of the Board of Directors of SCM and denies knowledge

or information sufficient to form a belief as to the truth of the other allegations of paragraph four of the complaint.

PARAGRAPH FIVE: Denies knowledge or information sufficient to form a belief as to the allegations of paragraph five of the complaint, except admits that the business of SCM includes, inter alia, the manufacture and sale of hard margarine to a limited class of customers, the manufacture and sale of barbecue sauce, and the refining of edible oils for sale to industrial and food service customers.

PARAGRAPH SIX: Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph six of the complaint to the extent they pertain to Kraftco, avers that it is not required to respond to legal conclusions and, except as heretofore admitted, denies the allegations of paragraph six of the complaint.

PARAGRAPH SEVEN: States that the allegations of paragraph seven of the complaint are conclusions of law as to which this respondent is not required to plead, but to the extent that these allegations may be deemed to be allegations of fact, they are denied.

AS AND FOR ITS FIRST AFFIRMATIVE DEFENSE:

States that the complaint fails to state a claim upon which relief can be granted as against SCM.

AS AND FOR ITS SECOND AFFIRMATIVE DEFENSE:

States that the complaint has been rendered moot by the resignation of Richard C. Bond from the Board of Directors of SCM on August 1, 1975.

AS AND FOR ITS THIRD AFFIRMATIVE DEFENSE:

States that competition between SCM and Kraftco, if any, is de minimis and as such, awarding relief as against SCM would not be consonant with the statutory purpose of 15 U.S.C. § 19 and would not be in furtherance of the public interest.

AS AND FOR ITS FOURTH AFFIRMATIVE DEFENSE:

States that Section 8 of the Clayton Act, 15 U.S.C. § 19, by its express terms, applies to and provides for relief only as against individuals in violation of the statute and that therefore, the Federal Trade Commission lacks jurisdiction over SCM.

AS AND FOR ITS FIFTH AFFIRMATIVE DEFENSE:

States that the uneven enforcement and discriminatory application of Section 8 of the Clayton Act, 15 U.S.C. § 19, by the Federal Trade Commission and the failure of the Commission to seek voluntary correction of the alleged violation by SCM, have resulted in a deprivation of SCM's constitutional rights, constituting a violation of due process of law, and failing to provide equal protection of the law.

WHEREFORE, respondent SCM demands judgment dismissing the complaint herein as against SCM.

Dated: New York, New York
November 17, 1975

SULLIVAN & CROMWELL

By William E Willi
(A Member of the Firm)

William E Pitt

Attorneys for Respondent
SCM Corporation
48 Wall Street
New York, New York
(212) 952-8100

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Answer Of SCM Corporation were served upon counsel for respondents by mail on the 17th day of November, 1975.

Counsel for Respondent Kraftco Corporation

C. Lee Cook, Jr., Esq.
Chadwell, Kayser, Ruggles, McGee & Hastings
135 South LaSalle Street,
Chicago, Illinois 60603

Counsel for Respondent Richard C. Bond

Frederic L. Ballard, Esq.
Ballard, Spahr, Andrews & Ingersoll
Land Title Building
Philadelphia, Pennsylvania 19110

Counsel Supporting the Complaint

Ronald Bloch, Esq.
Federal Trade Commission
Washington, D.C. 20580

Marcia D. Paul

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

In the Matter of	:	
KRAFTCO, INC., a corporation,	:	Docket No. 9035
SCM CORPORATION, a corporation,	:	
and	:	AFFIDAVIT
RICHARD C. BOND, an individual	:	

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

RICHARD SEXTON, being duly sworn, deposes and says:

1. I am a member of the Bar of the State of New York and am Vice President and General Counsel of respondent SCM Corporation ("SCM") and am fully familiar with the facts and circumstances surrounding the complaint herein.

2. I submit this affidavit in support of SCM's motion, dated November 17, 1975, to dismiss the complaint herein as against SCM and for such other and further relief as to the Federal Trade Commission ("the Commission") shall seem just and proper.

3. The complaint alleges that the simultaneous presence of Richard C. Bond on the Boards of Directors of Kraftco, Inc. ("Kraftco") and SCM violated Section 8 of the Clayton Act.

4. SCM is an industrial company which manufactures and distributes various products, including typewriters, business equipment, home appliances, paint, resins, food, chemicals, and paper. Total SCM domestic and foreign sales in the fiscal year ended June 30, 1975 were approximately $1,300,000,000. In the business and financial community, SCM is not known as a food company, and in fact, it is not primarily a food company. Kraftco is widely known as a food company and is primarily a food company. Total Kraftco sales for the year ended December 31, 1974 were approximately $4,500,000,000.

5. SCM has hard margarine sales of approximately $2 million annually; none of SCM's sales of hard margarine are made to the retail trade. Upon information and belief, Kraftco sells hard margarine to the retail trade only. Kraftco and

SCM do not compete in the sale of margarine. SCM's annual sales of barbecue sauce are approximately $3 million; some of these sales are made in competition with barbecue sauce sold by Kraftco. SCM is a large refiner of edible oils which it sells to industrial and food service customers; Kraftco also refines edible oils, for its own use and for sale to some of the same class of customers.

6. Mr. Bond became a member of the Board of Directors of SCM in 1967 and continued in such capacity through August 1, 1975 when his resignation was submitted. A copy of Mr. Bond's letter of resignation is annexed hereto as Exhibit A. Upon information and belief, Mr. Bond became a member of the Board of Directors of Kraftco in 1957, and continues in such capacity to date.

7. On July 22, 1975, SCM received a letter and a copy of the complaint herein from the Commission. Prior to that time, no claim had been made by the FTC to SCM with respect to the alleged interlock with Kraftco; and there had, therefore, been no request, oral or written, by the FTC to SCM to correct the alleged violation.

8. On or about March 7 of this year, I received a telephone call from an individual who identified himself as Clint Batterton, a member of the Commission staff. He asked whether Mr. Bond was on the Board of Directors of SCM

and said his inquiry was made in connection with a Section 8 Clayton Act investigation. I told Mr. Batterton that Mr. Bond was on the SCM Board of Directors and that his term of office was until the next annual meeting, which would be in October 1975. No mention was made of Kraftco; and there was no request for additional information or action. On June 18, 1975, the day before the complaint was issued, I received a telephone call from an individual who identified herself as Melinda Sherer, a member of the Commission staff. She said she was updating the Commission's information, and asked whether Mr. Bond was on SCM's Board of Directors. I said he was. Prior to the issuance of the complaint, these were the only Commission communications to SCM concerning this matter.

9. Upon information and belief, the Commission had no discussions about this matter with either Kraftco or Mr. Bond prior to their receipt of the complaint. As indicated above, almost immediately after his receipt of the complaint, Mr. Bond resigned from SCM's Board of Directors.

10. I am informed and believe that Mr. Bond has no intention of returning to the Board of Directors of SCM while he remains a member of the Board of Directors of Kraftco. Also, I am authorized to state on behalf of SCM that Mr. Bond

will not be re-elected to the Board of Directors of SCM so long as he is a director of Kraftco or any corporation which competes or might compete in any line of commerce with SCM.

Richard Sexton

Subscribed and sworn to
before me this day
of November, 1975.

Notary Public

CAROL KENLER
Notary Public, State of New York
No. 31-7220220
Qualified in New York County
Commission Expires March 30, 1976

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

In the Matter of	:	
KRAFTCO, INC., a corporation,	:	DOCKET NO. 9035
SCM CORPORATION, a corporation,	:	
and	:	AFFIDAVIT
RICHARD C. BOND, an individual.	:	

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MARCIA B. PAUL, being duly sworn, deposes and says:

1. I am a member of the bar of the State of New York and am associated with the firm of Sullivan & Cromwell, counsel for respondent SCM Corporation, ("SCM") in the above-captioned action.

2. I submit this affidavit in opposition to the motion of complaint counsel to note the default of and to enter order to cease and desist against respondent SCM Corporation, dated November 19, 1975.

3. Complaint counsel moves under Rule 3.12(c) of the Rules of Practice of the Federal Trade Commission, citing

SCM's alleged failure to answer the Commission's complaint no later than November 17, 1975. By order of the Administrative Law Judge, dated October 31, 1975, respondents were granted an extension of time to answer to November 17, 1975. A copy of this order granting said extension is annexed hereto as Exhibit A.

4. On November 17, 1975, respondent SCM served its answer in this proceeding, together with a notice of motion, affidavit, and memorandum in support of its motion for summary decision. I executed a certificate of service by mail for the answer and a separate certificate for the motion papers. Copies of these certificates are annexed hereto as Exhibits B and C respectively. Service in this manner is wholly consonant with federal practice, and, service by first class mail upon the Commission is expressly authorized by Rule 4.4(b).

5. I received a copy of the instant motion on Friday, November 21, 1975 and telephoned complaint counsel, Clinton Batterton, to discuss the matter. He informed me at that time that it was his position that SCM's answer was due at the office of the Secretary on November 17, and refused to discuss the matter further, although he expressed a willingness to discuss terms of a consent decree between SCM and the Commission, an alternative which is not now and has not, at any time, been acceptable to SCM for reasons set forth in SCM's motion for summary decision.

6. Rule 4.4(b) states that service shall be by delivering copies by first class mail to the Office of the Secretary. The Rule also states that documents are deemed filed with the Commission when they are received by the Office of the Secretary and that where service imposes time limitations upon Commission Counsel for a response, the time for such response shall not start running until the document served is delivered to the Assistant Bureau Director or Regional Office. Therefore, complaint counsel's time to respond would not commence running until he had actual delivery to him of the documents.

7. No prejudice has resulted to complaint counsel by reason of service as detailed above; no prejudice has been set forth by complaint counsel in their motion papers nor indeed could any such prejudice be demonstrated. However, prejudice resulting to SCM if this motion is granted would be substantial. As set forth in both SCM's answer and its motion papers, the complaint herein as against SCM should be dismissed; SCM by no means concedes that the allegations of the complaint as they pertain to SCM are true; and the proposed order is both unfair and unnecessary. Complaint counsel's motion must be denied in all respects.

Marcia B. Paul

Subscribed and sworn
to before me this
24th day of November, 1975.

Notary Public

PETER J. PETINO
Notary Public, State of New York
Residing in Queens County
Queens Co. Clk's No. 41-8344120
Certificate Filed in
New York Co. Clk's.
Commission Expires March 30, 1976

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of KRAFTCO, INC., a corporation, SCM CORPORATION, a corporation, and RICHARD C. BOND, an individual.	DOCKET NO. 9035 AFFIDAVIT

TO: The Honorable Morton Needelman
Administrative Law Judge

Washington
District of Columbia: SS:

Joseph Tasker, Jr., being duly sworn, deposes and says:

1. I am a member of the Bar of the District of Columbia and am an attorney with the Bureau of Competition of the Federal Trade Commission, Washington, D.C., and am fully familiar with the facts and circumstances surrounding the complaint herein.

2. I submit this affidavit in support of Counsel Supporting the Complaint's motion, dated December 1, 1975, for summary decision against Respondents SCM Corporation and Kraftco Corporation.

3. The affidavit of one Richard Sexton, Vice President and General Counsel of Respondent SCM Corporation, submitted in support of said respondent's motion for summary decision dismissing the complaint, and with which I am fully familiar, alleges, in part, based upon Mr. Sexton's information and belief, that Kraftco Corporation and SCM Corporation do not compete in the sale of hard margarine because SCM sells no hard margarine to the retail trade, while Kraftco

sells only to the retail trade. The statement that Kraftco Corporation sells hard margarine only to the retail trade is incorrect.

4. I have examined several issues of a trade publication entitled "Volume Feeding Institutions" which claims to serve readers in "restaurant, hotel, motor hotel chain and franchise headquarters; individual restaurants; hotels, motels, inns with foodservice; schools, colleges and universities; hospitals, health and welfare facilities; transportation and specialized institutions." This statement appears on the "contents" page of "Institutions" magazine, a copy of which is attached hereto and made a part hereof. In one such issue, viz. volume 77, No. 2, dated July 15, 1975, at pages 65 to 70, I observed a Kraftco Corporation advertisement promoting its hard margarine for use in the institutional trade. A photocopy of that advertisement is attached hereto and made a part hereof. This issue of "Institutions" magazine is on file at the Federal Trade Commission Library, 6th and Pennsylvania Avenue, Northwest, Washington, D.C.

5. I have examined the "1975 Buyers Guide and New Products Review" published by "Bakery Production and Marketing magazine, a trade publication provided, without charge, to "bakery owners, executives, managers and department heads." This statement is found on the "subscription information" page (page 10) of the 1975 Buyers Guide, a photocopy of which is attached hereto and made a part hereof. On page 78 of the buyers guide, under the heading for "suppliers of ingredients, Section 7, Shortenings & Oils" I observed that both the Durkee Division of Respondent SCM Corporation and the Kraft Foods Division of Respondent SCM Corporation are listed as suppliers of oleomargarine cubes and liquid to the bakery trade. A photocopy of page 78 of the 1975 Buyers Guide is attached hereto and made a part hereof. The Buyers Guide is on file at the Federal Trade Commission Library.

Joseph Tasker, Jr.
Joseph Tasker, Jr.

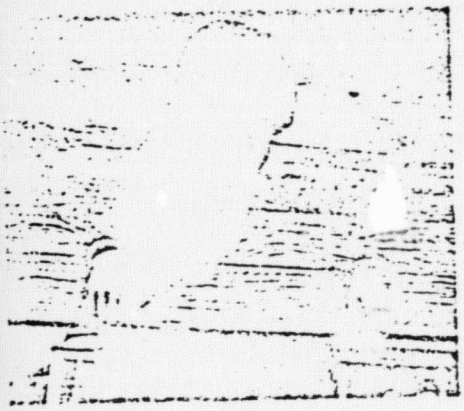
Subscribed and Sworn to before me this day of December, 1975.

Notary Public

Vol. 77 No. 2
Volume Feeding

Institutions

Serving readers in restaurant, hotel, motor hotel chain and franchise headquarters; individual restaurants; hotels, motels, inns with foodservice; schools, colleges and universities; hospitals, health and welfare facilities; transportation and specialized institutions.



On the Scene

In its 11-year history, the 400 has set the standard for foodservice/lodging information. It has trumpeted the industry's triumphs; it has put into perspective the industry's failures. Our staff updates the 400 files throughout the year, digging hard from March through June to complete the analysis of leading organizations. Sometimes the load seems heavy, as Managing Editor Betsy Raskin (top, in the stocks at the Milleridge Inn, Jericho, N.Y.) has learned. But each year the mammoth task is made a little lighter by the many operators who cooperate with our efforts to serve the industry. Our thanks to all.

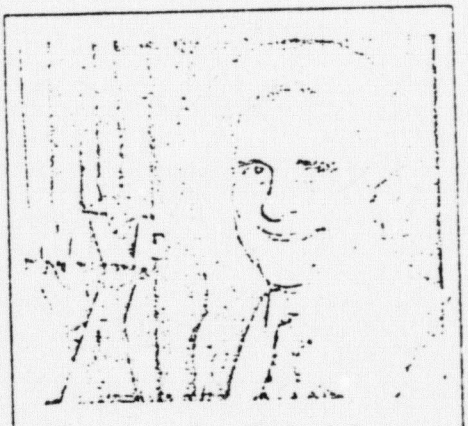
For our staff as well as the industry, the 400 gives a higher education in industry trends. One of our newer editors benefitting from this prize course is John Corcoran (above). John also edits the youngest member of the Institutions magazine family, Foodservice Distributor Salesman. Operators don't receive this monthly addendum to I/VF. It is bound into the issues published on the 15th of each month and mailed to key salesmen serving foodservice buyers.

(400 cover and feature photography by Bob Vukshinovich.)

Showcase

Up Front Focus

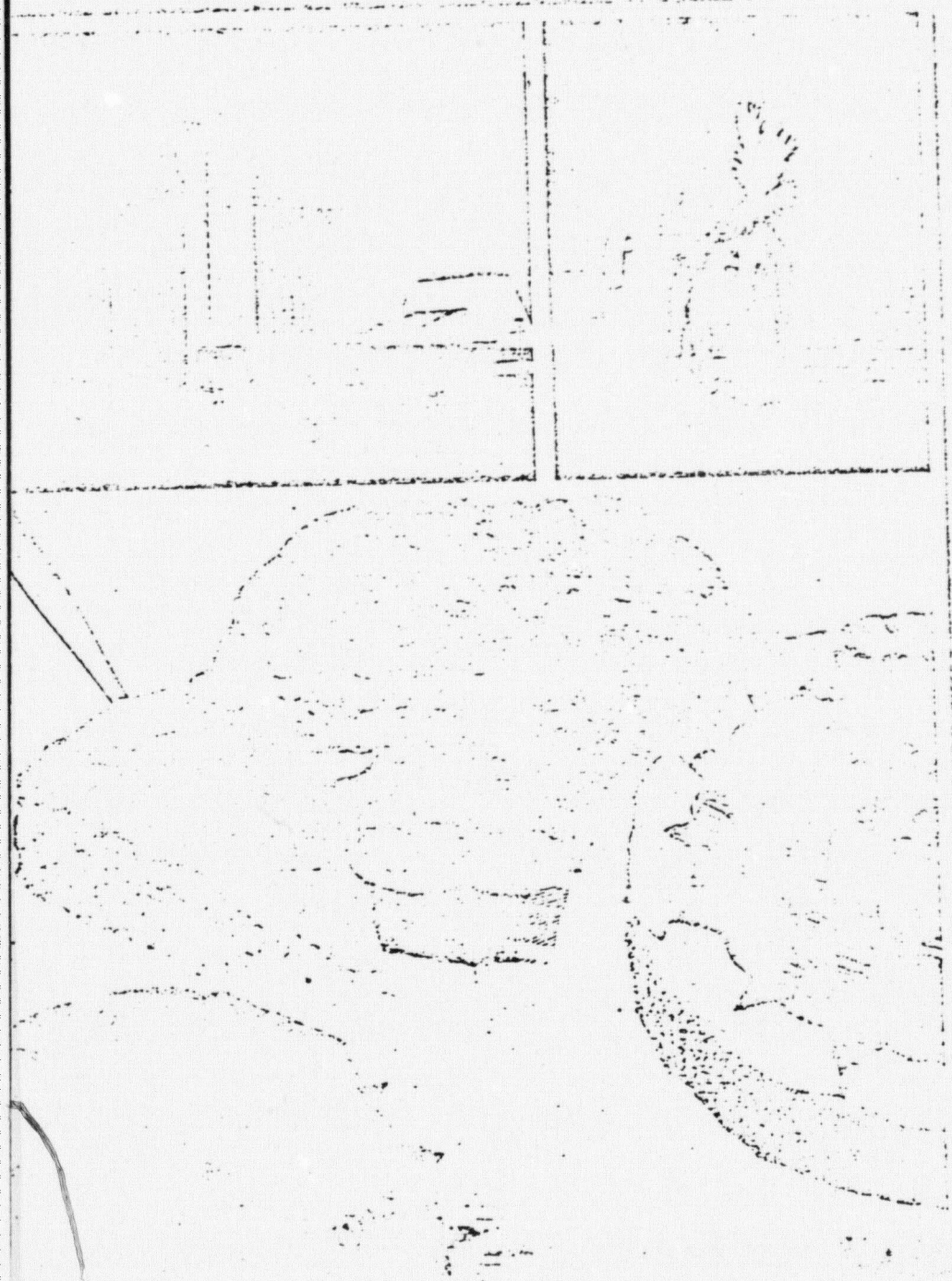
Action Express



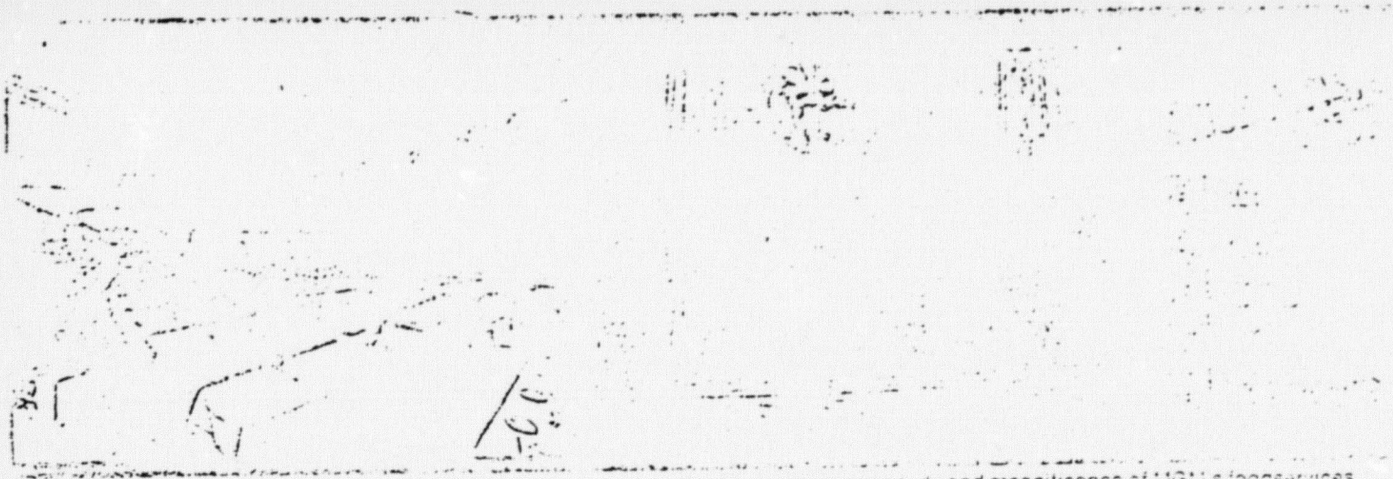
The Service World

James Moreland, pres., Jack's Fast Food Systems, Homewood, Ala., accepted Pepsi-Cola's Most Valuable Promotion Grand Award for 1974 last May. Other MVP winners, Bavarian Chalet, Altamont, N.Y.; Wall's Restaurants, Flint, Mich.; Sir Francis Drake motel, San Francisco; White Spot, Vancouver, B.C.; Farrell's, Portland, Ore.; Black Angus, Miami; Saga Food Service, Menlo Park, Calif.; Carrol's, Syracuse, N.Y. For your 1975 MVP entry kit, circle #261.

the culinary exchange

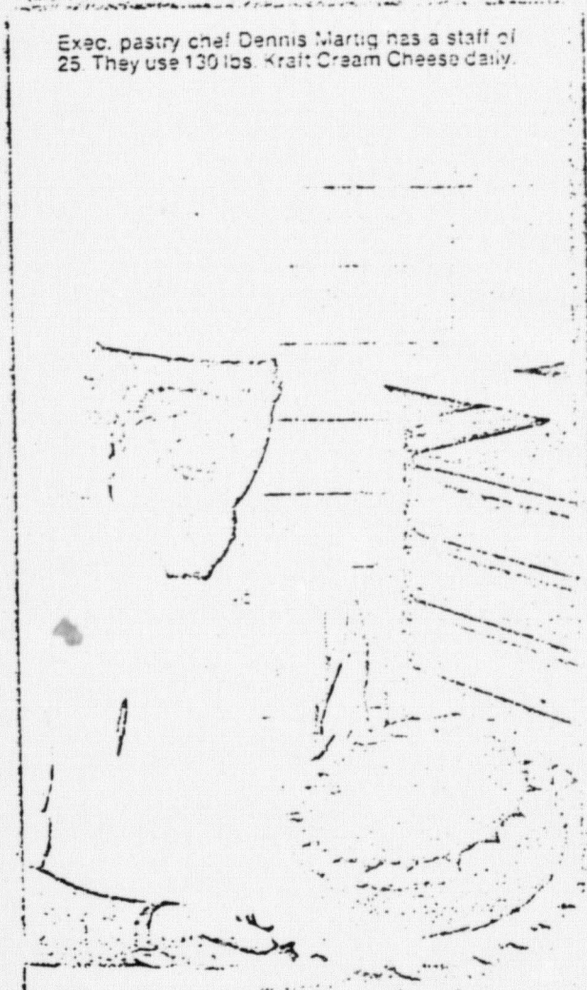


Everything's impressive at MGM's Grand Hotel—exterior, shows, cheesecakes.



A glimpse at the magnitude and magnificence of MGM's foodservices.

Exec. pastry chef Dennis Martig has a staff of 25. They use 130 lbs. Kraft Cream Cheese daily.



Grand-Scale Foodservice for MGM's Grand Hotel

With a block-long casino, over 1000 slot machines, extensive club, sport, recreational, shopping and theater facilities, plus huge convention and banquet halls, it is no wonder that this 2100-room luxury resort hotel requires almost 1500 food and beverage employees.

From a hot dog with Cheez Whiz at a snack bar to haute cuisine in a show-biz restaurant, the emphasis is on quality.

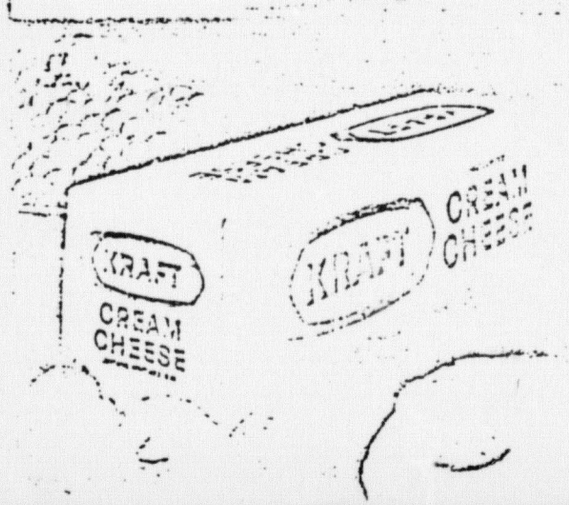
This point was strongly stressed by Dan Litwack, food and beverage director, who said, "Our knowledgeable hotel guests and affluent gambling clientele expect quality food, and we serve it to them. That's why it is so essential that we ally ourselves with quality-oriented suppliers, as we do with Kraft."

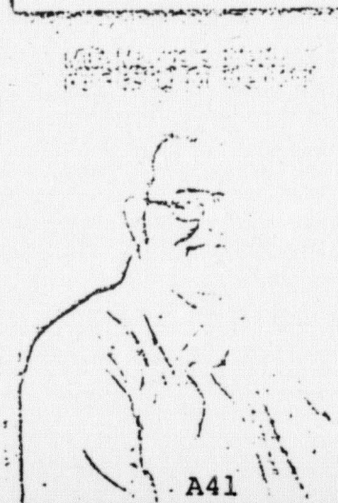
The primary guardian of quality is Michael Mavros, director of purchasing, who establishes specifications and sees that only acceptable products reach MGM's kitchens. It's a massive procurement and quality-control responsibility involving 14 restaurants and 28 bars.

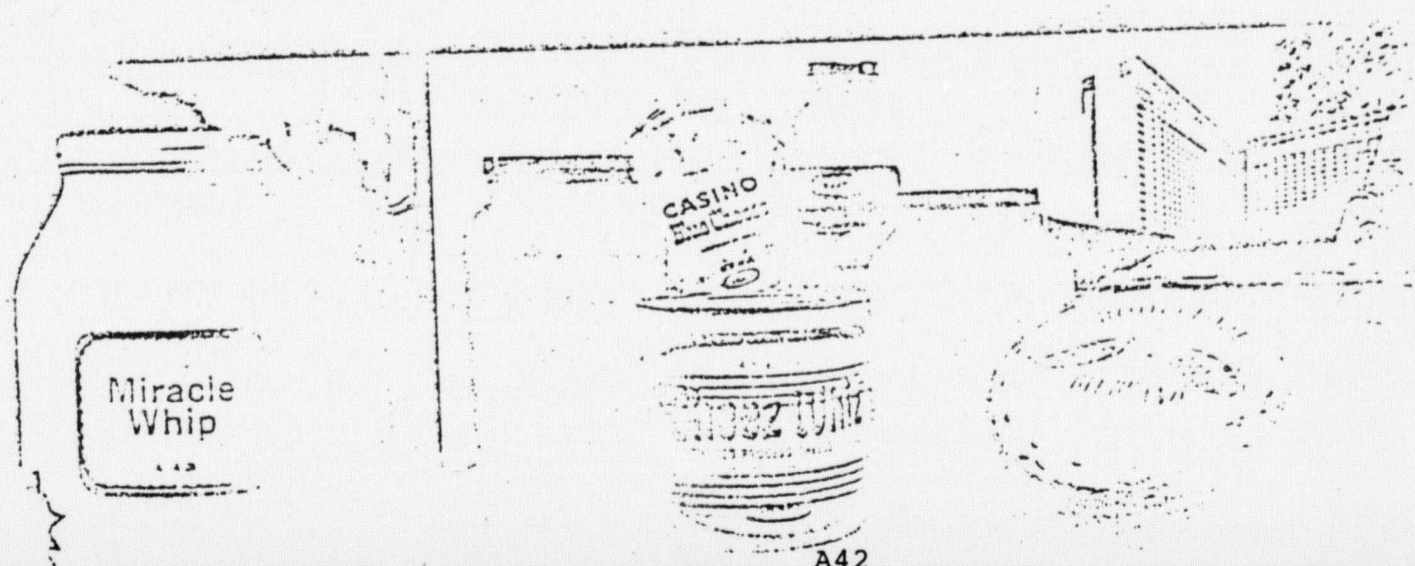
In commenting on his purchases, which for the most part are in minimum 50 case quantities, he elaborated, "We have never had any problems with Kraft products, which is why we use Kraft Extra-Heavy Mayonnaise, for example, and many other Kraft products exclusively."

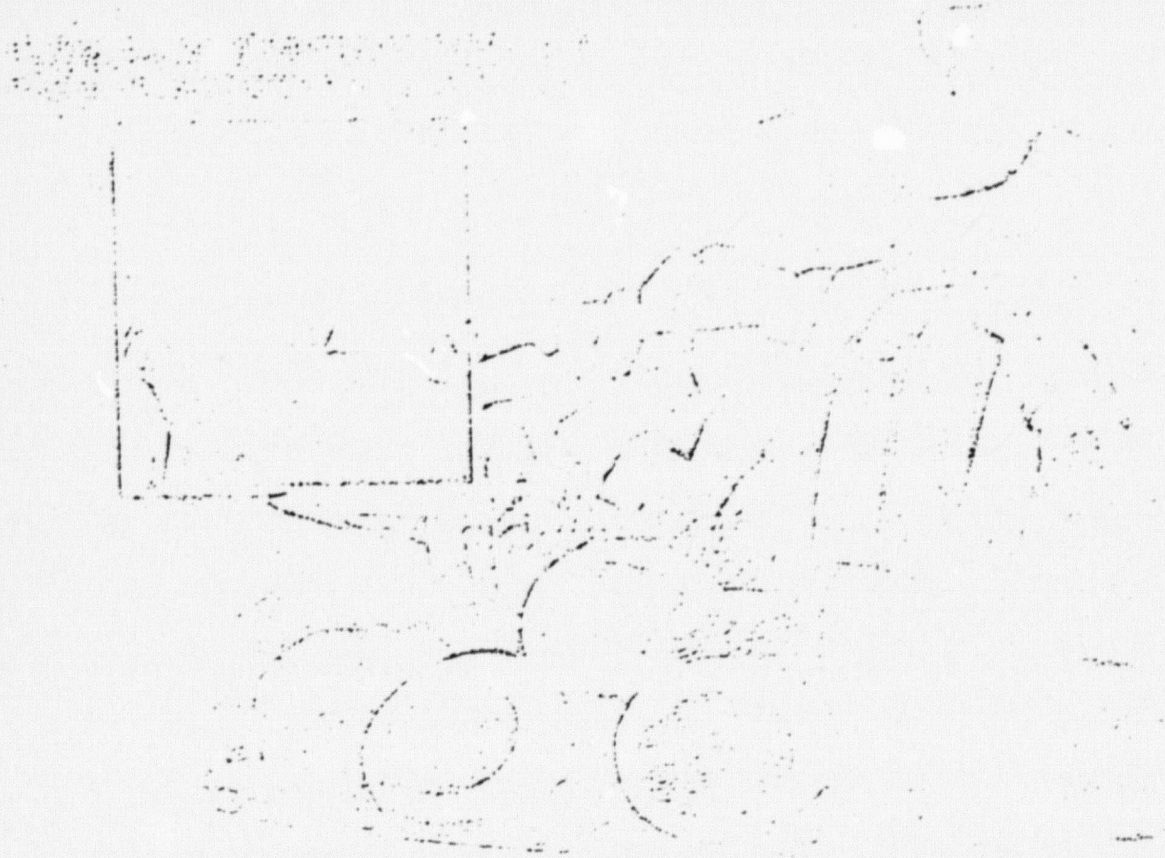
Most of MGM's house dressings, such as Tartar, French, Blue Cheese, Roquefort and 1000 Island, depend for their perfection on the performance of Kraft Mayonnaise. They mix up 140-gal. batches every other day.

The MGM Grand attracts discriminating patrons to its foodservices with a captivating ambiance, stellar showmanship, and a dedicated concern for quality food products.






Miracle
Whip
CASINO



Peppermill Inn – the coffee shop phenomenon on Las Vegas Boulevard

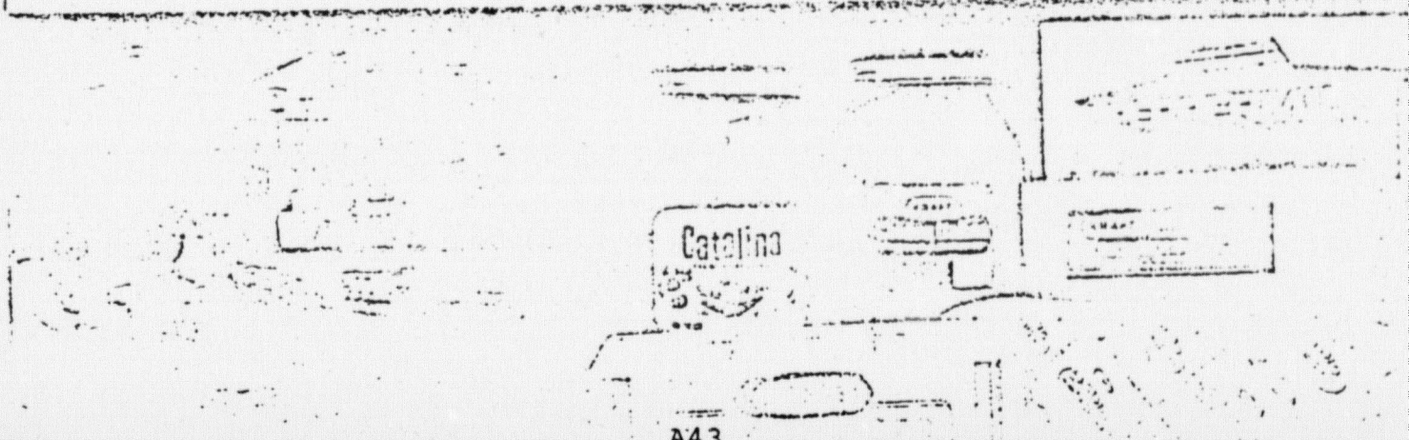
The ability to gross two million dollars indicates a combination that hit the jackpot. For the 165-seat-plus-bar Peppermill, these are a prime location on busy Las Vegas Boulevard, distinctive design and decor, an attractive menu selection, and amiable service.

Let Bill Beck, assistant manager, explain: "The management of Peppermill – three in operation and three under construction – are sticklers for detail. Not only about the atmosphere we project, and the accessories we use, but about the ingredients we buy.

"Our concern for quality is evident when you look in our refrigerator. The cheeses are all Kraft's. In our storeroom all the dressings are Kraft's. Kraft Mayonnaise is tops. We used to make our own Italian and French, but no more. After we tried Catalina French, we switched to it. Unless requested otherwise, the waitress pours on a 2-oz. ladlefull at the salad station. Catalina is good on anything.

"When we mixed our own oil and vinegar, employees would fail to stir it. Now we use Kraft Golden Italian because it's uniformly smooth and pourable, has the zesty taste salad lovers like."

In summing up, Mr. Beck said: "Because the Peppermill Restaurants don't compromise where quality is concerned, we have to align ourselves with firms like Kraft, who feel as we do. Our professional pride and our company policy demand it."



Backbone of unique menu is roast turkey & fried chicken

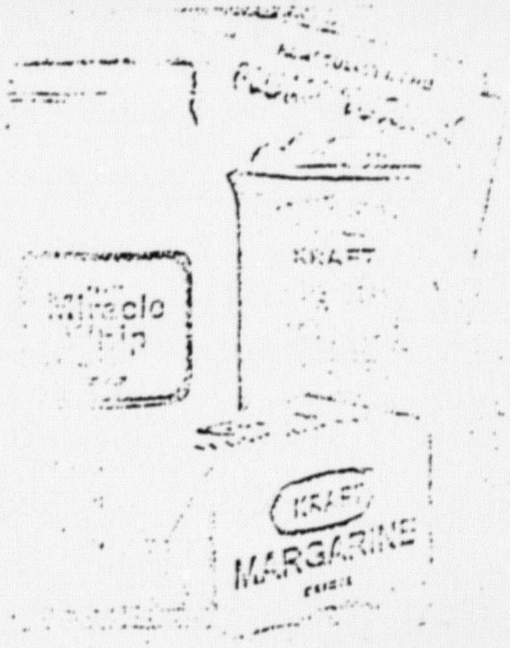
new concept in foodservice was introduced by the Conk and stwick families when they built a perennial menu around roast key and fried chicken. Appropriately, they named it Plump key and Chicken Time. Their newest operation in Las Vegas nbines a take-out section with a pleasant 110-seat restaurant. As spokesman for brother Phil, father Clifton and Kent Prestwick, ry Conk radiates an entrepreneur's optimism. The public has ponded enthusiastically to their limited menu. Chicken alone uires six pressure fryers and four 75-lb. open kettles in the chen. They are filled with Kraft Red Label Type Shortening.

n talking about their operational philosophy, Terry Conk said, e are a family with a tradition of fine food, which we prepare ll and serve at a reasonable price; we do not sacrifice quality production."

A trip through storeroom and kitchen bears this out. They use gin Print Margarine from Kraft in turkey dressing, on rolls, in shed potatoes, and some for grill and frying. Kraft P-C Honey d Cranberry Sauce go in take-outs; Kraft Boston Baked Beans are ed on catering jobs. The dressings are all Kraft's.

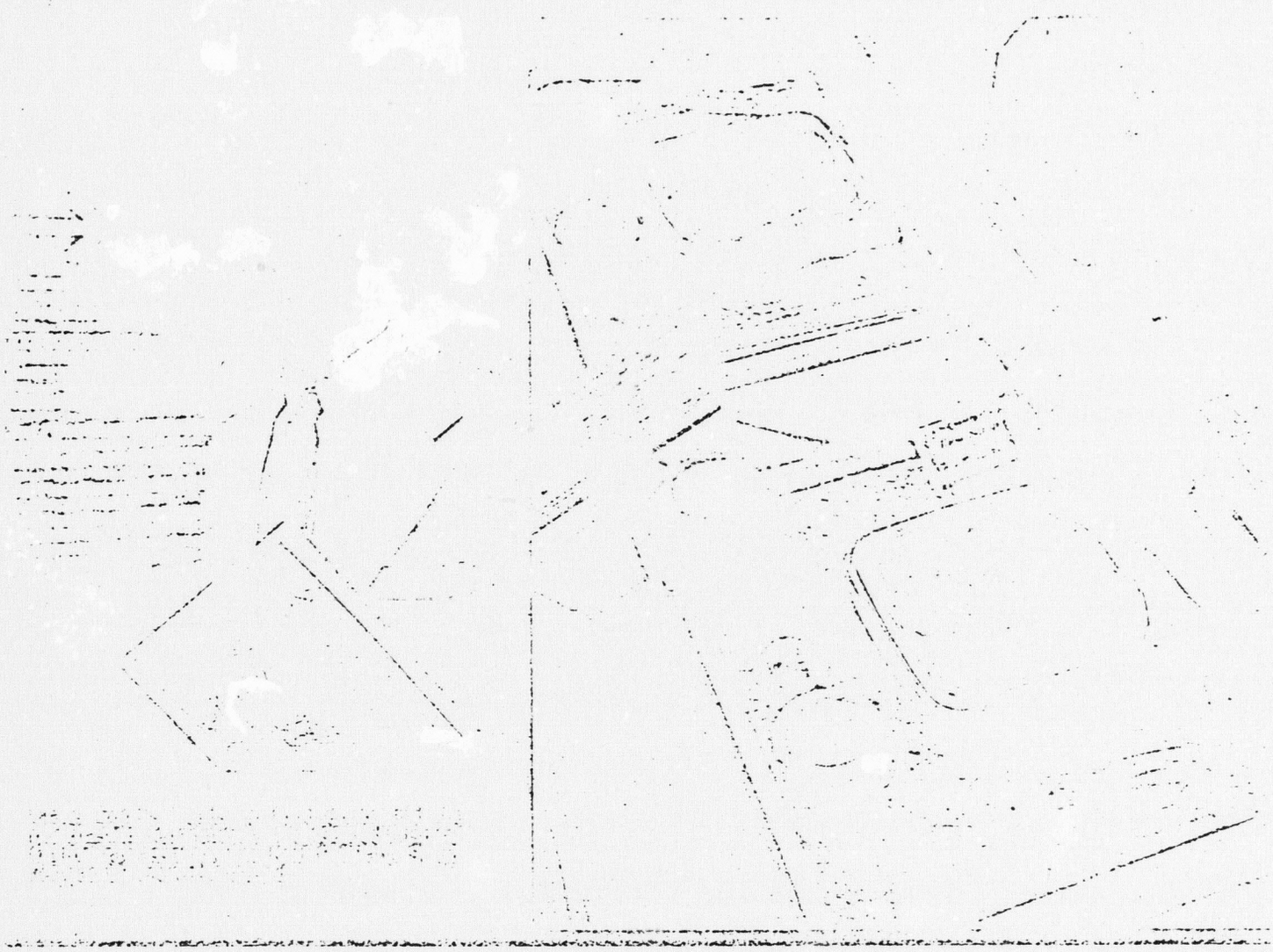
Of these, Terry says, "Nothing compares to Miracle Whip and to aft Mayonnaise, which we mix two to one for making our house ecialty dressing."

Terry Conk's closing comment was, "Because we are a quality staurant, we do business with a quality house: Kraft."




Terry Conk and his father, Clifton, confer.


Plump Turkey Salad, and Plump Turkey Filet, are served on halved fresh-baked rolls, with accompaniments as shown. The house dressing combines Kraft Mayonnaise with Miracle Whip, to which pimiento pieces, onions, sweet pickle relish, and mustard are added.



Innovative feeding at Sunrise Hospital

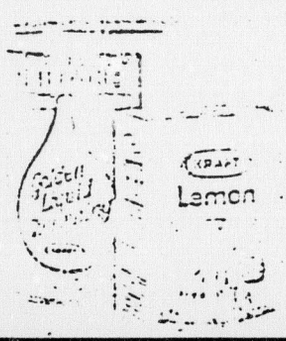
Their menus won a gold award at the National Restaurant Show. By this you know that the glamor spots of Las Vegas don't have a monopoly on flair in foodservice.

The persons responsible for the hospital's menus of distinction are Claus Eggers and chief dietitian Sandra Holliday. As Eggers explains his role, "Las Vegas is a stimulating environment. Consequently, we try to make our menus more interesting, even diverting, and serve wine and beer when permitted by doctor. We buy choice meats and the best-quality foods. Our talented cooks stress presentation and endeavor to be different."

After discussing their around-the-world dishes, Mr. Eggers turned to ingredients, saying, "I've been familiar with Kraft for some time.

"Kraft Gelatin, for example, has always come out tops in our blind taste-tests of competitive products. Kraft P-Cs are the best there is. There is no doubt about it. The jelly P-Cs are perfect, and the size is good. For our use, we prefer the cup ketchup to the squeeze pack. And as to shortening and salad dressings, you could say I'm hung up on them'."

By buying quality products, and emulating the showmanship of the area's fine dining rooms, Claus Eggers has erased the image evoked by "hospital food" for patients and staff of Sunrise Hospital.



Battery
BUYER'S
GUIDE

BAKERY
PRODUCTION AND MARKETING

EDITORIAL STAFF

John Gorman
Bill Gorman
Publishers
Tom Gorman
Editor
Arnie Orloski
Managing Editor
John Lynch
Senior Associate Editor
Frank Gruber
Baker Editor
Barry Krozel
News Editor
Viv Gorman
Product News Editor
Lucy Kennedy
Editorial Associate
Lloyd Schultz
Production Manager
Louis Frosh
Art Director

Washington bureau
Jim Snyder and Bob Hickox
1050 Potomac St.
Washington, D.C. 20007
(202) 338-6105

contributing editors
Marge Carroll
Retailing
Simon Jackel, Ph.D.
Bakery Technology
Gil Larsen
Distribution
Larry Powell
Cake Decorating
Benjamin Werne
Labor Relations

BUSINESS STAFF
Gorman Publishing Company
3460 John Hancock Center
Chicago, Illinois 60611
Phone: (312) 943-5300

President .....John Gorman
Exec. Vice President .....Bill Gorman
Vice President .....Tom Gorman
Advertising Mgr. .....Shirley Geoglanian
Business Manager .....Bill Brown
Admin. Assistants .....Marge Orloski
Maureen Allan
Dora Hodal
Classified Ads .....Cathy Temple
Circulation Manager .....C. W. Taylor

ABP

SUBSCRIPTION INFORMATION

Bakery Production and Marketing is published monthly for baker owners, executives, managers and dept. heads. It is mailed at no cost to the qualified readers in the U.S. A. (See free subscription card in this issue). To others, $24.00 one year in the U.S., Canada, and Possessions; $45.00 in all other countries (sent Air Mail). Single copy $2.50. For information, write Circulation dept., Gorman Publishing, 3460 John Hancock Center, Chicago, Ill. 60611. Controlled circulation paid at Lake Elmo, Minn.

"Postmaster—do not forward"

Spudnut, Inc. (F-G)
Standex Co. (C-L)
Tasty Mix Products Inc. (K)
Universal Foods (F-G-L)
Watson Foods Co. (A-B-C-D-E-F-G-J-K-L)
Weber Flour Mills (A-C-D-F-K)
Westco Products (A-B-C-D-E-F-G-H-J-L)
Western Bakers Supply Co. (A-B-C-E-F-G-J-K-L)
Whipple Co. (B)
Willmark Sales Co., Inc. (A-B-C-D-E-F-G-H-J-K-L)

ICING BASES

(A) buttercream; (B) chocolate; (C) fudge

J. W. Allen Co. (C)
American Products Co., Inc. (B-C)
Basic Foods Div. (C)
Bear Stewart Corp. (C)
Besco Products (C)
Brechet & Richter (C)
H. C. Brill Co. (C)
Brokay Products (C)
Brolite Co. (C)
Caravan Products Co., Inc. (B-C)
Central Ohio Supply Co. (A-C)
Crescent Mfg. Co. (C)
The DCA Co. (C)
Dawn Donut Co. (C)
Charles Dennery Co. (C)
Alex Doerffer Corp. (C)
Efco Products, Inc. (C)
Fantastic Fudge, Inc. (C)
A. Fiorillo & Co. (C)
Fonco, Inc. (C)
Frank Foods, Inc. (C)
Globe Preserves, Inc. (B-C)
S. Gumpert Co., Inc. (C)
Henry & Henry Inc. (A-B-C)
Hirsch Brothers Co. (C)
Intl. Multifoods (C)
H. A. Johnson Co. (C)
Kamish Food Products Co. (C)
Karps (A-B-C)
Lawrence Foods (A-B-C)
Oscar Lucks Co. (C)
MOJ Products Corp. (C)
Adolf J. Mainzer Inc. (C)
Mallet & Co., Inc. (C)
Mars Fudge & Fruit Co., Inc. (C)
James Mussman Co. (C)
National Products Co. (C)
S. W. Noggle Co. (C)
The Ogan Co., Inc. (C)
Ph. Orth Co. (C)
Rich-Federal Foods, Inc. (C)
Richardson & Holland Corp. (C)
Rust Sales Co. (C)
S & M Quality Foods, Inc. (A)
J. Sausville Sons (C)
Standex Co. (C)
Title Products Co. (A)
Universal Foods (C)
Western Bakers Supply Co. (B-C)
Whipple Co. (C)
Willmark Sales Co., Inc. (C)

MARZIPAN MIX

Rust Sales Co.

MERINGUE MIXES

J. W. Allen Co.
American Products Co. Inc.
T. H. Angermeier & Co.
Baker Brands
Basic Foods Div.
Besco Products
Billings & Gage Mfg. Co.
Brokay Products
Byrnes & Kiefer Co.
Cargill Inc.
Central Ohio Supply Co.
Chefmaster
The DCA Co.
Charles Dennery Co.
S. Gumpert Co., Inc.
Henry & Henry Inc.
Hirsch Brothers Co.
Holton Food Prod. Co.
Intl. Multifoods
Kamish Food Products Co.
Karps
Lawrence Foods
National Products Co.
S. W. Noggle Co.
The Ogan Co., Inc.
Ph. Orth Co.
Pfeil & Holing, Inc.
Rich-Federal Foods, Inc.
Richardson & Holland Corp.
Rust Sales Co.
S & M Quality Foods, Inc.
J. Sausville Sons
Seymour Foods Co.
A. E. Staley Mfg. Co.
Standex Co.
Tasty Mix Products Inc.
Westco Products
Western Bakers Supply Co.
Willmark Sales Co., Inc.

Each of these 1,080 Buyers Guide manufacturers had to meet our Verification standards (see pg. 54).

Shortenings & Oils

LARD

(A) cubes; (B) liquid

Allfresh Food Products, Inc. (A-B)
Chicago Shortening Corp. (A-B)
Delmar Products (A)
Hunt-Wesson Foods (A)
E. Kahn's Sons Co. (A)
Rust Sales Co. (A)
Swift Edible Oil Co. (A)
Unisource Foods Corp. (A)
Wilson & Co., Inc. (A)

OLEOMARGARINE

(A) cubes; (B) liquid; (C) sheeted

Allfresh Food Products Inc. (A-C)
Anderson Clayton Foods (A)
Anheuser-Busch Inc. (A)
Breakstone Sugar Creek Foods (A)
CPC Intl., Best Foods Div. (A)
Capital City Products (A)
Delmar Products (A)
Durkee Food Service Group (A-B-C)
Durkee Indust. Foods Group (A-B-C)
J. H. Filbert, Inc. (A)
Fleischmann Industrial Div. (A-B)
Hunt-Wesson Foods (A)
Kraft Foods Co. (A-B)
Lever Bros. Co. (A)
PVO International Inc. (A)
Rust Sales Co. (A)
Shedd-Bartush Foods, Inc. (A-B)
Swift Edible Oil Co. (A-B-C)
Universal Foods (A)
Wilsey Foods, Inc. (A)
Wilson & Co., Inc. (A)

SHORTENING

(A) all-purpose liquid vegetable; (B) all-purpose plastic blend; (C) all-purpose plastic vegetable; (D) liquid bread; (E) liquid cake; (F) plastic cake; (G) puff pastry; (H) cocoa butter; (J) frying

Allfresh Food Products Inc. (B-C-F-G-J)
Anderson Clayton Foods (B-C-F)
Anheuser-Busch Inc. (G)
Bakers Chocolate & Coconut (H)
Blommer Chocolate Co. (H)
CPC Intl., Best Foods Div. (A-C-F-J)
Capital City Products (C-E-F-J)
Central Soya (C-F)
Delmar Products (B-C-D-F)
Durkee Food Service Group (A-B-C-D-E-F-G)
Durkee Indust. Foods Group (A-B-C-D-E-F-G)
Fleischmann Industrial Div. (A-G-J)
Gerkens (Holland) Cocoa Prods. (H)
HumKo Products (A-B-C-D-E-F-G)
Hunt-Wesson Foods (C-F-G)
E. Kahn's Sons Co. (B-F)
Kraft Foods Co. (C-F-G-J)
Lever Bros. Co. (C-F-G)
Mallet & Co., Inc. (A-J)
PVO International Inc. (B-C-F-G-J)
Procter & Gamble Co. (A-C-D-E-F-G)
Rath Packing Co. (B-C-D-E-F)
Riceland Foods (C-F)
Rust Sales Co. (A-B-C-D-F)
Swift Edible Oil Co. (A-B-C-D-F-G)
The Theobald Industries (B-C-F)
Unisource Foods Corp. (B-C-F)
Universal Foods (G)
Wilbur Chocolate Co., Inc. (H)
Wilsey Foods, Inc. (A-B-C-F-G-J)
Wilson & Co., Inc. (B-C-F-G)

VEGETABLE OILS

(A) corn; (B) cottonseed; (C) palm; (D) peanut; (E) safflower; (F) soybean; (G) coconut

Allfresh Food Products Inc. (A-B-D-F)
Anderson Clayton Foods (A-D-F)
CPC Intl., Best Foods Div. (A-B-D-F-G)
Capital City Products (A-B-C-D-F-G)
Cargill Inc. (F-G)
Central Soya (F)
Delmar Products (A-B-D-F)
Durkee Food Service Group (A-B-D-F-G)
Durkee Indust. Foods Group (A-B-C-D-E-F)
Fleischmann Industrial Div. (D)
HumKo Products (A-B-C-D-F)
Hunt-Wesson Foods (D)
Lever Bros. Co. (C)
National Protein Corp. (F)
PVO International Inc. (A-B-C-D-E-F-G)
Procter & Gamble Co. (F)
Riceland Foods (F)
Rust Sales Co. (F)
A. E. Staley Mfg. Co. (A-B-F)
Swift Edible Oil Co. (A-B-F)

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

In the Matter of	:	
KRAFTCO, INC., a corporation,	:	Docket No. 9035
SCM CORPORATION, a corporation,	:	
and	:	
RICHARD C. BOND, an individual.	:	AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

RICHARD SEXTON, being duly sworn, deposes and says:

1. I am a member of the Bar of the State of New York and am Vice President and General Counsel of respondent SCM Corporation ("SCM") and am fully familiar with the facts and circumstances surrounding the complaint herein.

2. I submit this affidavit in opposition to the motion for summary decision by Counsel supporting the Complaint, served December 4, 1975, and in further support of the motion for summary decision by respondent SCM Corporation, dated November 17, 1975.

3. SCM is moving for summary decision in its favor on the basis of the undisputed facts: the fact that Richard C. Bond voluntarily resigned as a director of SCM immediately after the complaint herein was served on respondents; that such complaint was the first communication by the Commission or its staff to respondents in which it was claimed that Mr. Bond's simultaneous service on the Board of Directors of SCM and Kraftco, Inc. ("Kraftco") violated Section 8 of the Clayton Act; that Mr. Bond's resignation was accepted by SCM at the August 21, 1975 meeting of the SCM Board of Directors, the first regular meeting of the SCM Board of Directors following service of the complaint herein; that SCM is a corporation (and therefore is not a proper party within the contemplation of Section 8 of the Clayton Act); and the uneven and inconsistent enforcement of Section 8 of the Clayton Act by the Commission and Department of Justice. The facts necessary for the determination of SCM's motion are not controverted and, SCM submits, require a dismissal of the complaint.

4. In contrast, complaint counsel's motion for summary decision incorrectly assumes that the contested allegations of the complaint have been proved and that the defenses asserted by SCM have been disproved. For example, complaint counsel relies upon the fact that both Kraftco and SCM admit to selling barbecue sauce. Yet complaint counsel offers no evidence to demonstrate the extent to

which the two companies compete in the sale of barbecue sauce, what the respective sales volumes are, or in what sections of the country the product is sold.

5. The complaint charges that "Kraftco and SCM, by the nature of their margarine, edible oil, and barbecue sauce business and location of their operations with respect to said products are competitors of each other." (Emphasis added) (Comp. para. SIX). Those allegations are put at issue by denials in the answers of SCM (para. SIX) and Kraftco (para. 7). But no evidence is offered by complaint counsel with respect to the "nature" of either SCM or Kraftco's "business" or the "location" of their "operations".

6. In support of its motion, complaint counsel offers the affidavit of Joseph Tasker, Jr., dated December 1, 1975, which indicated that, contrary to my information and belief as stated in my affidavit herein dated November 17, 1975, Kraftco does sell hard margarine to industrial food service customers. The extent of the factual confusion here is emphasized by my own lack of knowledge as to this matter. In addition, Mr. Tasker's affidavit discloses no facts with respect to volume of sales, market areas or other such important marketing facts, all of which would be subjects of proof at a hearing.

7. Complaint counsel offers no evidence in contradiction of the defenses raised by SCM in its answer, including

the de minimis nature of any competition that might exist between SCM and Kraftco, and the uneven enforcement and discriminatory application by the Commission of Section 8 of the Clayton Act.

8. Nor does complaint counsel offer any evidence to contradict SCM's basic position that their exists no cognizable danger of recurrent violation and that therefore there is no necessity for any relief against SCM in light of Mr. Bond's prompt resignation, and his and SCM's assurances that Mr. Bond would not again simultaneously serve on the Board of Directors of SCM and Kraftco . Mr. Bond's assurance has now been incorporated in a proposed consent order, a copy of which is annexed hereto as Exhibit A. That proposed order against the individual director who simultaneously held the two directorships should, SCM respectfully submits, be more than adequate relief for the Commission in this case. There is no need for more; and complaint counsel has offered no evidence of any such need.

9. In summary, there are issues of material fact raised by complaint counsel's motion, unlike SCM's motion, which is limited only to those aspects of the case which are unquestioned and which, we submit, require its dismissal.

Richard Sexton

Subscribed and sworn
to before me this 12th day
of December, 1975

Notary Public

CAROL KENLER
Notary Public, State of New York
No. 31-7228220
Qualified in New York County

Exhibit A

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of KRAFTCO, Inc., a corporation, SCM CORPORATION, a corporation, and RICHARD C. BOND, an individual.	DOCKET NO. 9035 AGREEMENT CONTAINING ORDER TO CEASE AND DESIST

The Federal Trade Commission having issued a complaint against the above-named respondents on June 17, 1975, charging violation of Section 8 of the Clayton Act as amended and Section 5(a)(1) of the Federal Trade Commission Act, and it now appearing that Respondent Richard C. Bond, by his attorney, is willing to enter into an agreement containing an order to cease and desist from violating the law as alleged in the said complaint,

IT IS HEREBY AGREED by and between Richard C. Bond and his attorney and counsel for the Federal Trade Commission that:

1. Respondent Richard C. Bond (hereafter "Respondent") is an individual.

2. Only for the purpose of this proceeding and for compliance and enforcement proceedings under the order contemplated hereby, Respondent admits the jurisdictional allegations set forth in the complaint issued against Respondent by the Commission on June 17, 1975.

3. Respondent waives:

(a) Any further procedural steps;

(b) The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law; and

(c) All rights to seek judicial review or otherwise challenge or contest the validity of the order entered pursuant to this agreement.

4. This agreement shall not become a part of the official record of the proceeding unless and until it is accepted by the Commission. If this matter is withdrawn from adjudication, the Commission may (1) accept the agreement, (2) reject it and return the matter to adjudication for further proceedings, or (3) take such other action as it may deem appropriate. If this agreement is accepted, the Commission will place it on the public record, and at the same time will make available an explanation of the provisions of the order and the relief to be obtained thereby and any other information which it deems helpful in assisting interested persons to understand the terms of the order. For a period of sixty (60) days after placement of the order on the public record and issuance of the statement, the Commission will receive and consider any comments or views concerning the order that may be filed by any interested persons. Thereafter, within thirty (30) days, if comments or views submitted to the Commission disclose facts or considerations which indicate that the order contained in the agreement is inappropriate, improper, or inadequate, the Commission may withdraw its acceptance of this agreement and so notify Respondent, in which event it will return the matter to adjudication for further proceedings, or take such other action as it may consider appropriate, or issue and serve its decision in disposition of the proceeding.

5. This agreement is for settlement purposes only and does not constitute and admission by Respondent that the law has been violated as alleged in the complaint issued against Respondent by the Commission on June 17, 1975.

6. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of Section 3.25(d) of the Commission's Rules, the Commission may, without further notice to Respondent, issue its decision containing the following order to cease and desist in disposition of the proceeding, and make information public in respect thereto. When so entered, the order to cease and desist shall become final upon service and shall have the same force and effect and may be altered, modified or set aside in the same manner and within the same time provided by statute for other orders. The complaint may be used in construing the terms of the order, and no agreement, understanding, representation, or interpretation not contained in the order or this agreement may be used to vary or contradict the terms of the order.

7. Respondent has read the complaint issued against him by the Commission on June 17, 1975, and the order contemplated hereby, and understands that once the order has been issued, he may be liable for a civil penalty in the amount provided by then-existing law for each violation of the order after it becomes final.

ORDER

1. IT IS ORDERED that upon this order becoming final Respondent, Richard C. Bond, so long as he remains a director of Kraftco, Inc., (a) shall not resume his position as a director of SCM Corporation, and (b) shall not accept or continue to hold a position as director of any other corporation engaged in or affecting interstate commerce as defined in the Clayton or Federal Trade Commission Acts which is in competition with Kraftco, Inc.

2. IT IS FURTHER ORDERED that within thirty (30) days from the date on which this order is served upon him Respondent shall file with the Commission a written report setting forth the manner and form in which he has complied with this order.

Signed this 31st day of October, 1975.

Richard C. Bond
BALLARD, SPAHR, ANDREWS & INGERSOLL

By _____
Frederic L. Ballard, Esq.
Counsel for Richard C. Bond

APPROVED:

Alfred F. Dougherty, Jr.
Assistant Director
Bureau of Competition

Owen M. Johnson, Jr.
Director
Bureau of Competition

Ronald A. Bloch

Clinton R. Batterton
Counsel for the Federal Trade Commission

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of KRAFTCO, INC., a corporation, SCM CORPORATION, a corporation, and RICHARD C. BOND, an individual.	DOCKET NO. 9035

ORDER CLOSING RECORD AND ESTABLISHING POST-HEARING SCHEDULE

This matter will be submitted for initial decision on the basis of a factual stipulation to be filed by the parties on April 29, 1976. With the filing of this stipulation, the record will be closed for the reception of evidence. Thereafter, the parties are to brief this matter according to the following schedule:

1. Proposed findings and main briefs will be filed simultaneously on May 10, 1976.

2. Reply findings and answering briefs will be filed on May 24, 1976.

3. Upon review of the briefs and findings, the Administrative Law Judge will determine whether oral argument will be useful, and if it is I will set a date upon consultation with attorneys for both sides.

Morton Needelman
Administrative Law Judge

April 13, 1976

4-13-76

ENTERED

UNITED STATES OF AMERICA

BEFORE

FEDERAL TRADE COMMISSION

DOCKET NO. 9035

IN THE MATTER OF:

KRAFTCO, INC., et al

ORDER

F. T. C. 4-511

FTC L-3556

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Commissioners:

Calvin J. Collier, Chairman
Paul Rand Dixon
Elizabeth Hanford Dole
Stephen Nye

In the Matter of	DOCKET NO. D-9035
RICHARD C. BOND, an individual.	DECISION AND ORDER

The Federal Trade Commission having heretofore issued its complaint charging the respondent named in the caption hereto with violation of Section 8 of the Clayton Act and Section 5(a)(1) of the Federal Trade Commission Act, and the respondent having been served with a copy of the complaint and with a copy of the notice of contemplated relief accompanying said complaint; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint heretofore issued, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter issued an order withdrawing the matter described in the caption hereto from adjudication for the purpose of considering the proposed consent agreement pursuant to Section 3.25 of its Rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing a consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the

comment filed thereafter by interested persons pursuant to Section 3.25(d) of the Commission's Rules, now in further conformity with the procedure prescribed in Section 3.25 of its Rules, the Commission hereby issues its decision in disposition of the proceeding against the above named respondent, makes the following jurisdictional findings, and enters the following order:

1. Respondent, Richard C. Bond, is an individual.

2. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over the respondent, and the proceeding is in the public interest.

ORDER

1. IT IS ORDERED that upon this order becoming final Respondent, Richard C. Bond, so long as he remains a director of Kraftco, Inc., (a) shall not resume his position as a director of SCM Corporation, and (b) shall not accept or continue to hold a position as director of any other corporation engaged in or affecting interstate commerce as defined in the Clayton or Federal Trade Commission Acts which is in competition with Kraftco, Inc.

2. IT IS FURTHER ORDERED that within thirty (30) days from the date on which this order is served upon him Respondent shall file with the Commission a written report setting forth the manner and form in which he has complied with this order.

By the Commission.

S E A L

Chas. A. Tobin

Charles A. Tobin,
Secretary.

ISSUED: April 26, 1976

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of KRAFTCO, INC., a corporation, SCM CORPORATION, a corporation, and RICHARD C. BOND, an individual.	DOCKET NO. 9035

TO: The Honorable Morton Needelman
Administrative Law Judge

STIPULATION

IT IS HEREBY STIPULATED AND AGREED between complaint counsel and counsel for respondent SCM Corporation that the accuracy of the following facts is admitted in connection with the above-captioned proceeding:

1. SCM's Total Sales

Total net sales of SCM Corporation ("SCM") in its fiscal year ended June 30, 1975 were $1,287,000,000. In fiscal 1975, SCM had aggregate sales of margarine, edible oils and barbecue sauce in competition with Kraftco Corpora-

tion ("Kraftco"), as indicated in items 2, 3 and 4 below, of approximately $83 million. During the same period, Kraftco had sales of the same products in competition with SCM, as indicated in items 2, 3 and 4 below, of approximately $258 million.

2. Sales of Margarine

I. Industrial Bakeries

a) SCM sells margarine to two industrial bakeries located in Pennsylvania and Colorado. The margarine SCM sells is manufactured for SCM in Cincinnati, Ohio. Kraftco sells or attempts to sell margarine to industrial bakeries in competition with SCM in Pennsylvania and Colorado.

b) SCM sales of margarine to industrial bakeries in fiscal 1975 were less than $643,500. Kraftco sales of margarine to industrial bakeries in Pennsylvania and Colorado during the same period totalled $162,000.

II. The Food Service Industry

a) SCM sells margarine to wholesalers for resale to the food service industry in forty-one states. The margarine SCM sells is manufactured for SCM in Cincinnati, Ohio. Kraftco sells margarine directly to the food service industry. Kraftco also sells to wholesalers for resale to the food service industry in competition

with SCM in the forty-one states in which SCM sells margarine to wholesalers for resale to the food service industry.

b) SCM sales of margarine to wholesalers for resale to the food service industry in fiscal 1975 were less than $386,100. Kraftco's sales of margarine to wholesalers for resale to the food service industry in the same period in the forty-one states in which SCM sells totalled $10,611,000.

3. The Edible Oil Business of SCM and Kraftco

I. Industrial Food Processors

a) SCM sells edible oil to industrial manufacturers of fried snacks in every state. SCM manufactures its edible oil in Kentucky and Illinois. Kraftco sells edible oil to industrial manufacturers of fried snacks, in competition with SCM in every state.

b) SCM's sales of edible oil to industrial manufacturers of fried snacks in fiscal 1975 were less than $25,740,000.

c) SCM sells or attempts to sell edible oil to industrial manufacturers of prepared mixes and industrial bakeries in every state. Kraftco sells edible oil to industrial manufacturers of prepared mixes and industrial bakeries in competition with SCM in every state.

d) SCM's sales of edible oil to industrial manufacturers of prepared mixes and industrial bakeries in fiscal 1975 were less than $25,740,000.

e) Kraftco's sales of edible oil to industrial customers, including industrial manufacturers of fried snacks, industrial manufacturers of prepared mixes, industrial bakeries, and other industrial customers in the same period totalled $160,621,000.

II. The Food Service Industry

a) SCM sells or attempts to sell edible oil to the food service industry in every state. SCM manufactures its edible oil in Kentucky and Illinois. Kraftco sells edible oil to the food service industry in competition with SCM in every state.

b) SCM's sales of edible oil to the food service industry in fiscal 1975 were less than $64,350,000. Kraftco's sales of edible oil to the food service industry in the same period totalled $76,130,000.

4. The Barbecue Sauce Business of SCM and Kraftco

I. The Retail Grocery Trade

a) SCM sells or attempts to sell barbecue sauce to the retail grocery trade west of the Mississippi River. The barbecue sauce sold by SCM is manufactured in

City of Industry, California. Approximately 85% of SCM's sales of barbecue sauce are to the retail grocery trade in California, with the remaining sales sparsely distributed among the retail grocery trade in 21 states. Kraftco sells barbecue sauce to the retail grocery trade in competition with SCM in states west of the Mississippi River.

b) SCM's sales of barbecue sauce to the retail grocery trade in fiscal 1975 were less than $6,435,000. Kraftco's sales of barbecue sauce to the retail grocery trade west of the Mississippi River in the same period totalled $10,186,000.

II. The Food Service Industry

a) SCM sells or attempts to sell barbecue sauce to wholesalers for resale to the food service industry west of the Mississippi River. The barbecue sauce sold by SCM is manufactured in City of Industry, California. Kraftco sells barbecue sauce to wholesalers for resale to the food service industry in competition with SCM in states west of the Mississippi River.

b) SCM's sales of barbecue sauce to the food service industry in fiscal 1975 were less than $257,400. Kraftco's sales of barbecue sauce to the food service

industry west of the Mississippi River in the same period totalled $856,000.

5. Advertising of SCM and Kraftco Margarine, Edible Oil and Barbecue Sauce Products

In the year ended June 30, 1975, Kraftco and SCM advertised their respective margarine, edible oil, and barbecue sauce products in trade publications as follows:

SCM paid for a listing of its margarine, edible oil, and barbecue sauce business in the Chef Institutional Buyers Guide, the OPD Chemical Buyers Guide, and in one issue of Bakery Production and Marketing. SCM also advertised its edible oil products in the following trade publications during the same period:

Amusement Business
Bakery Production and Marketing
Box Office
Candy & Snack Industry
Cooking for Profit
Food Engineering
Food Management
Food Processing
Food Product Development
Food Service Distributor Salesman
Food Service Marketing
Food Technology
Hospitality
Institutional Distribution
Institutions
Manufacturing Confectioner
Metropolitan Restaurant News
Milling and Baking News
Nations Restaurant News
Restaurant Business

Kraftco advertised its margarine products in the following trade publications during the same period:

Bakery Production and Marketing
Food Engineering
Food Processing
Food Product Development
Food Technology
Retail Baking Today
Snack Food

Kraftco advertised its edible oil products in the following trade publications during the same period:

Bakery Production and Marketing
Cooking for Profit
Drive-in Fast Food
Food Processing
Food Product Development
Food Service
Food Technology
Hospitality
Institutions
Manufacturing Confectioner
Nations Restaurant News
Potato Chipper
Retail Baking Today
Snack Food

Kraftco advertised its barbecue sauce products in the following trade publications during the same period:

Food Processing
Food Product Development
Snack Food

6. F.T.C. Investigations and Proceedings Under Section 8 of the Clayton Act Since 1960

IT IS FURTHER STIPULATED AND AGREED that the series of forty-two summaries of cases annexed hereto as Exhibit A, constitute accurate and complete answers to

questions posed to complaint counsel by counsel for SCM concerning all investigations and proceedings arising from or concerning Section 8 of the Clayton Act, before the Federal Trade Commission (the "Commission") since 1960 with the following exceptions:

(1) For three files missing from the Federal Records Center, no summary has been supplied.

(2) Of these three matters, two were referred to the Justice Department, i.e., Phillips Petroleum, File No. 601 0637 (9/15/60) and Sears, Roebuck & Co., File No. 611 0629 (2/28/64). The third matter, Dierks Forests, Inc., et al., Dkt. No. 8113, was dismissed on an unopposed motion of respondents after the director resigned. 58 F.T.C. 304 (1961).

IT IS FURTHER STIPULATED AND AGREED that:

(1) Prior to 1975, the Commission usually followed the practice of issuing a Part II complaint prior to issuance of a Part III or final complaint.

(2) Since 1970, the Commission has followed the practice of conducting "preliminary" investigations in addition to "formal" investigations.

(3) Exhibit B hereto is an accurate and complete schedule of the number of interlocks and companies involved in each of the formal investigations or consent orders summarized in Exhibit A.

(4) Other than decisions and orders of the Commission, there are no documents in the possession, custody or control of the Commission or its Staff which set forth "in whole or in part, the policy of the Commission with respect to enforcement of Section 8 of the Clayton Act," including written guidelines thereon.

IT IS FURTHER STIPULATED AND AGREED that the information set forth above and in Exhibits A and B hereto is hereby admitted and incorporated as a part of the stipulated record in this case and may be referred to by the parties herein in connection with the above-captioned proceeding.

Dated: April 28, 1976

SULLIVAN & CROMWELL

By William E. Willis
(William E. Willis)

Marcia B. Paul
(Marcia B. Paul)

48 Wall Street
New York, New York 10005
Counsel for Respondent
SCM Corporation

Respectfully submitted,

Ronald A. Bloch

Clinton R. Batterton

Joseph Tasker, Jr.

Joseph Tasker, Jr.
Counsel Supporting the Complaint

APPROVED:

Morton Needelman
Administrative Law Judge

EXHIBIT A

Summaries of F.T.C.
Investigations and Proceedings
Under Section 8 of the
Clayton Act.

1. FILE NUMBER: 501-0034

2. DATE OPENED: 8-10-59

3. COMPLAINT ISSUED? No

4. ORDER ISSUED? No

4A. IF SO, WHAT WERE ITS TERMS?

5. IF NOT,

5A. DATE CLOSED: 3-21-60

5B. REASON (IF ANY) FOR CLOSING:

After investigation, staff concluded that there was no violation, recommended closing.

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED? Seven common directors were involved. Some resigned, others did not seek re-election.

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS?
After letters of inquiry were sent.

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? Yes

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE? None

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS? N/A

1. FILE NUMBER: 611 0196

2. DATE OPENED: 2-7-61

3. COMPLAINT ISSUED? No

4. ORDER ISSUED? No

4A. IF SO, WHAT WERE ITS TERMS?

5. IF NOT,

5A. DATE CLOSED: 9-14-61

5B. REASON (IF ANY) FOR CLOSING:
Assurance of discontinuance by the director led staff to recommend closing

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED?
Yes

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS?
October 18, 1961

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? Yes

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE? A conference was held to inform the director of Section 8 and the results of staff investigation which pointed to a violation thereof.

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS?
The director, by affidavit, informed staff of his resignation and, while reserving his right to serve on one or the other board, stated that he did not intend at any future time to be a director of both.

1. FILE NUMBER: 621-0821

2. DATE OPENED: 1-25-62

3. COMPLAINT ISSUED? No

4. ORDER ISSUED? No

4A. IF SO, WHAT WERE ITS TERMS?

5. IF NOT,

5A. DATE CLOSED: 5-1-62

5B. REASON (IF ANY) FOR CLOSING:
Letter and affidavit received from individual respondent containing assurance of discontinuance led the staff to recommend no further proceedings.

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED? Yes

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS? Letter stated that respondent 's name would not be put up for re-election at the 4-16-62 annual meeting.

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? Yes

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE? Letter was sent to individual respondent informing him of Section 8.

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS? Letter discussed in Q. 5B was received.

1. FILE NUMBER: 621-0840, involves the same two corporations as 6 -0841

2. DATE OPENED: 2-14-62

3. COMPLAINT ISSUED? No

4. ORDER ISSUED? No

4A. IF SO, WHAT WERE ITS TERMS?

5. IF NOT,

5A. DATE CLOSED: May 15, 1962

5B. REASON (IF ANY) FOR CLOSING:
1) Affidavit of Discontinuance*, executed by respondent
2) Staff learned that respondent was in process of retiring from one board.

* Staff made clear that an affidavit containing a statement of no intention to serve as a director of the subject corporation in the future as required.

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED? Yes

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS? Prior to initiation of investigation; annual meeting December 20, 1961.

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? Yes.

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE? None. A letter of inquiry requesting information from respondent was sent, but it did not request any negotiations.

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS? N/A

1. FILE NUMBER: 621-0841, same corporations as 621-0840

2. DATE OPENED: 2-14-62

3. COMPLAINT ISSUED? No

4. ORDER ISSUED? No

4A. IF SO, WHAT WERE ITS TERMS?

5. IF NOT,

5A. DATE CLOSED: 7-18-62

5B. REASON (IF ANY) FOR CLOSING:
Affidavit of discontinuance and assurance of no future recurrance by respondent led the staff to recommend closing.

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED? Yes. He did not stand for reelection at the annual meeting, 5-16-62.

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS?
Prior to issuance of complaint.

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? Yes.

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE? None. Letter of inquiry was sent to individual, but it did not ask for negotiations Respondent was informed of what was needed to close, and he complie

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS?

1. FILE NUMBER: 631 0626

2. DATE OPENED: 5-10-63

3. COMPLAINT ISSUED? No

4. ORDER ISSUED? No

4A. IF SO, WHAT WERE ITS TERMS?

5. IF NOT,

5A. DATE CLOSED: 11-19-63

5B. REASON (IF ANY) FOR CLOSING:
Published reports, confirmed by one corporation, that the individual respondent had resigned from the board four months after initial election led staff to recommend closing.

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED? Yes

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS? 8-5-63; after letter of inquiry had been sent.

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? Yes.

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE? None. A letter of inquiry sought information but did not seek negotiations.

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS?

1. FILE NUMBER: 651 0619

2. DATE OPENED: November 6, 1964

3. COMPLAINT ISSUED? No

4. ORDER ISSUED? No

4A. IF SO, WHAT WERE ITS TERMS?

5. IF NOT,

5A. DATE CLOSED: December 21, 1964

5B. REASON (IF ANY) FOR CLOSING: The interlocking director resigned from one corporation's board of directors and submitted an affidavit of discontinuance agreeing not to serve as a director of two competing companies in this market. Staff determined that no further action was warranted.

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED? Resigned

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS? After being notified of the Commission's investigation.

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? Yes

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE? No

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS? N/A

1. FILE NUMBER: 651 0622

2. DATE OPENED: November 18, 1964

3. COMPLAINT ISSUED? No

4. ORDER ISSUED? No

4A. IF SO, WHAT WERE ITS TERMS?

5. IF NOT,

5A. DATE CLOSED: March 15, 1966

5B. REASON (IF ANY) FOR CLOSING:
Investigation disclosed that the two corporations were not in actual competition. The products manufactured were of different nature and sold in different markets.

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED? No

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS? N/A

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? Yes

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE? None

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS? N/A

1. FILE NUMBER: 651 0630

2. DATE OPENED: November 10, 1964

3. COMPLAINT ISSUED? No

4. ORDER ISSUED? No

4A. IF SO, WHAT WERE ITS TERMS?

5. IF NOT,

5A. DATE CLOSED: December 2, 1965

5B. REASON (IF ANY) FOR CLOSING:
The interlocking director resigned from one respondent with assurances that he would not participate in the direction, control or conduct of the business of the company from which he resigned. In light of a factual question as to actual competition between the two companies, it was decided that no further action was warranted.

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED? Resigned

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS? September 24, 19

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? Yes

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE? Discussions were conducted with the corporate respondents and the director.

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS? The director resigned and issued the above assurance of discontinuance.

1. FILE NUMBER: 651 0631

2. DATE OPENED: November 10, 1964

3. COMPLAINT ISSUED? NO

4. ORDER ISSUED? NO

4A. IF SO, WHAT WERE ITS TERMS? N/A

5. IF NOT,

5A. DATE CLOSED: December 1, 1969

5B. REASON (IF ANY) FOR CLOSING:

The investigation was closed upon recommendation of the Special Committee on Case Load Screening after sitting idle for five years.

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED? NO

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS? N/A

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? YES

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE? NO

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS? N/A.

1. FILE NUMBER: 651 0632

2. DATE OPENED: November 10, 1964

3. COMPLAINT ISSUED? No

4. ORDER ISSUED? No

4A. IF SO, WHAT WERE ITS TERMS?

5. IF NOT,

5A. DATE CLOSED: December 1, 1969

5B. REASON (IF ANY) FOR CLOSING:

The investigation disclosed that the two interlocked corporations had ceased to produce competing products.

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED? No

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS? N/A

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? Yes

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE? None

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS? N/A

1. FILE NUMBER: 651 0636

2. DATE OPENED: January 11, 1965

3. COMPLAINT ISSUED? NO

4. ORDER ISSUED? NO

4A. IF SO, WHAT WERE ITS TERMS?

5. IF NOT,

5A. DATE CLOSED: April 25, 1969

5B. REASON (IF ANY) FOR CLOSING:

One respondent advised that it no longer produced the product manufactured by the other respondent.

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED? NO

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS? N/A

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? YES

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE? NO

8. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS? N/A

1. FILE NUMBER: 651 0637

2. DATE OPENED: January 11, 1965

3. COMPLAINT ISSUED? NO

4. ORDER ISSUED? NO

4A. IF SO, WHAT WERE ITS TERMS?

5. IF NOT,

5A. DATE CLOSED: April 25, 1969.

5B. REASON (IF ANY) FOR CLOSING:

One respondent advised that it no longer produced the product manufactured by the other respondent.

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED? NO

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS? N/A

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? YES

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE? NO

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS? N/A

1. FILE NUMBER: 651 0647

2. DATE OPENED: April 7, 1965

3. COMPLAINT ISSUED? No

4. ORDER ISSUED? No

4A. IF SO, WHAT WERE ITS TERMS?

5. IF NOT,

5A. DATE CLOSED: May 31, 1972.

5B. REASON (IF ANY) FOR CLOSING:
The Section 8 case was not pursued in light of one respondent's acquisition of a controlling interest in the second respondent. A Section 7 investigation was conducted, but subsequently closed for lack of evidence of competitive injury to the market.

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED? The two interlocking directors resigned from one of the respondents.

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS? September 8, 196 after being advised of the Commission's intent to file a complaint.

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? Yes, by letter dated June 4, 1965.

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE? Part II complaint followed by discussions with respondents.

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS? No agreement as to specific terms of a consent order was reached.

1. FILE NUMBER: 66[illegible]-0604

2. DATE OPENED: 8-4-65

3. COMPLAINT ISSUED? No

4. ORDER ISSUED? No

4A. IF SO, WHAT WERE ITS TERMS?

5. IF NOT,

5A. DATE CLOSED: 12-13-66

5B. REASON (IF ANY) FOR CLOSING:
Director reached mandatory retirement age for one board and thus was terminated during the course of the proceedings. On this basis, staff recommended closing.

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED? Yes.

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS? See 5B above.

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? Yes. By inquiry letter.

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE? None.

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS?

1. FILE NUMBER: 661-0615

2. DATE OPENED: 9-20-65

3. COMPLAINT ISSUED? No

4. ORDER ISSUED? No

4A. IF SO, WHAT WERE ITS TERMS?

5. IF NOT,

5A. DATE CLOSED: 12-21-65

5B. REASON (IF ANY) FOR CLOSING: The director, who had tendered his resignation prior to initiation of the investigation, had it accepted, and, by letter, assured that he did not intend to resume his directorship as long as any possible Section 8 violation existed.

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED? Yes.

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS?
After receipt of letter of inquiry.

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? Yes.

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE? None.

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS?

1. FILE NUMBER: 711 0063

2. DATE OPENED: January 26, 1971

3. COMPLAINT ISSUED? No

4. ORDER ISSUED? No

4A. IF SO, WHAT WERE ITS TERMS?

5. IF NOT,

5A. DATE CLOSED: March 6, 1973

5B. REASON (IF ANY) FOR CLOSING:

Closed by the Commission in response for a request for compulsory process to investigate possible anticompetitive effects of vertical corporate interlocks under Section 5 FTCA.

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED? N/A

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS?

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? No

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE? None

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS?

1. FILE NUMBER: 721 0601

2. DATE OPENED: July 9, 1971

3. COMPLAINT ISSUED? No

4. ORDER ISSUED? No

4A. IF SO, WHAT WERE ITS TERMS?

5. IF NOT,

5A. DATE CLOSED: June 20, 1973

5B. REASON (IF ANY) FOR CLOSING: Interlocking director, who also held substantial stock ownership in interlocked companies, did not stand for re-election to board of directors and sold his stock in one of the companies. Staff determined that the sale of the stock sufficiently severed any future risk of interlocks.

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED?
Yes. Did not stand for reelection.

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS?
April 24, 1973 after being informed of the investigation.

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? Yes

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE? No

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS? N/A

1. FILE NUMBER: 731 0024

2. DATE OPENED: January 12, 1973

3. COMPLAINT ISSUED? No

4. ORDER ISSUED? No

4A. IF SO, WHAT WERE ITS TERMS?

5. IF NOT,

5A. DATE CLOSED: March 6, 1973

5B. REASON (IF ANY) FOR CLOSING:

Closed by the Commission in response to a request for compulsory process to investigate possible anticompetitive effects of indirect corporate interlocks between respondents and a third corporation.

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED? N/A

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS?

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? No

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE? None

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS?

1. FILE NUMBER: 731 0031

2. DATE OPENED: February 6, 1973

3. COMPLAINT ISSUED? No

4. ORDER ISSUED? No

4A. IF S , WHAT WERE ITS TERMS?

5. IF NOT,

5A. DATE CLOSED: March 6, 1973

5B. REASON (IF ANY) FOR CLOSING:
Closed by the Commission in response to a request for compulsory process to investigate possible anticompetitive effects of vertical corporate interlocks under Section 5 FTCA.

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED? N/A

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS?

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? No

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE? None

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS?

1. FILE NUMBER: 741 0032

2. DATE OPENED: 3-21-74

3. COMPLAINT ISSUED? No

4. ORDER ISSUED? No

4A. IF SO, WHAT WERE ITS TERMS?

5. IF NOT,

5A. DATE CLOSED: 6-25-74

5B. REASON (IF ANY) FOR CLOSING: Two directors interlocked two energy corporations. During the course of investigation staff learned that one director had reached mandatory retirement age and the other, because of notoriety of the interlock, did not stand for re-election. This investigation was part of the Energy study; staff recommended closing because it was felt that pursuing a past interlock was not worth the cost, in light of the six complaints that were concurrently recommended against energy interlocks.

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED?
Yes

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS? *

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? No

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE? None

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS? N/A

* Mandatory retirement on June 30, 1973, prior to initiation of investigation. The other director did not stand for re-election at the April 1974 annual meeting. The file indicates that this information was obtained from public sources, and no contact with respondents was ever made.

1. FILE NUMBER: C-2415 Aluminum Company of America

2. DATE OPENED: November 8, 1972

3. COMPLAINT ISSUED? June 21, 1973

4. ORDER ISSUED? June 21, 1973

4A. IF SO, WHAT WERE ITS TERMS?

1. Prohibited director interlocks with named competitor.

2. Required statement from each director listing all other companies with capital, surplus and undivided profits in excess of $1 million, of which such person is a director.

3. Required notification of any change in corporate respondent.

4. Required compliance report.

5. IF NOT,

5A. DATE CLOSED:

5B. REASON (IF ANY) FOR CLOSING:

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED? Resigned

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS? December 1, 1972, after being advised of Commission's intent to file a complaint.

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? The files indicate no notice to respondents prior to receipt of the Part II complaint dated November, 20, 1972.

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE? Part II complaint followed by discussions with respondents.

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS? Above Consent Order. Respondent argued that these cases were moot since the interlocking director had resigned from one corporation's board of directors. They further argued for dismissal since in previous cases Section 8 charges had been dropped when the interlocks were voluntarily severed. The Commission determined on January 16, 1973 that respondents were not entitled to dismissal for mootness and that normal consent negotiations should proceed.

1. FILE NUMBER: C-2416 Armco Steel Company

2. DATE OPENED: November 8, 1972

3. COMPLAINT ISSUED? June 21, 1973

4. ORDER ISSUED? June 21, 1973

4A. IF SO, WHAT WERE ITS TERMS?

1. Prohibited director interlocks with named competitor.

2. Required statement from each director listing all other companies with capital, surplus and undivided profits in excess of $1 million, of which such person is a director.

3. Required notification of any change in corporate respondent.

4. Required compliance report.

5. IF NOT,

5A. DATE CLOSED:

5B. REASON (IF ANY) FOR CLOSING:

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED? Resigned

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS? December 1, 1972, after being advised of Commission's intent to file a complaint.

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? The files indicate no notice to respondents prior to receipt of the Part II complaint dated November, 20, 1972.

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE? Part II complaint followed by discussions with respondents.

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS? Above Consent Order. Respondent argued that these cases were moot since the interlocking director had resigned from one corporation's board of directors. They further argued for dismissal since in previous cases Section 8 charges had been dropped when the interlocks were voluntarily severed. The Commission determined on January 16, 1973 that respondents were not entitled to dismissal for mootness and that normal consent negotiations should proceed.

1. FILE NUMBER: C 2417 Aluminum Company of America

2. DATE OPENED: November 8, 1972

3. COMPLAINT ISSUED? June 21, 1973

4. ORDER ISSUED? June 21, 1973

4A. IF SO, WHAT WERE ITS TERMS?

1. Prohibited director interlocks with named competitor.

2. Required statement from each director listing all other companies with capital, surplus and undivided profits in excess of $1 million, of which such person is a director.

3. Required notification of any change in corporate respondent.

4. Required compliance report.

5. IF NOT,

5A. DATE CLOSED:

5B. REASON (IF ANY) FOR CLOSING:

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED? Resigned

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS? November 20, 1972 after being notified of Commission's intent to file a complaint.

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? The files indicate no notice to respondents prior to receipt of the Part II complaint dated November, 20, 1972.

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE? Part II complaint followed by discussions with respondents.

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS? Above Consent Order. Respondents argued that these cases were moot since the interlocking director had resigned from one corporation's board of directors. They further argued for dismissal since in previous cases Section 8 charges had been dropped when the interlocks were voluntarily severed. The Commission determined on January 16, 1973 that respondents were not entitled to dismissal for mootness and that normal consent negotiations should proceed.

1. FILE NUMBER: C 2418 Kennecott Copper Corporation

2. DATE OPENED: November 8, 1972

3. COMPLAINT ISSUED? June 21, 1973

4. ORDER ISSUED? June 21, 1973

4A. IF SO, WHAT WERE ITS TERMS?

1. Prohibited director interlocks with named competitor.

2. Required statement from each director listing all other companies with capital, surplus and undivided profits in excess of $1 million, of which such person is a director.

3. Required notification of any change in corporate respondent.

4. Required compliance report.

5. IF NOT,

5A. DATE CLOSED:

5B. REASON (IF ANY) FOR CLOSING:

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED? Resigned

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS? November 20, 1972 after being advised of Commission's intent to file a complaint.

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? The files indicate no notice to respondents prior to receipt of the Part II complaint dated November, 20, 1972.

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE? Part II complaint followed by discussions with respondents.

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS? Above Consent Order. Respondent argued that these cases were moot since the interlocking director had resigned from one corporation's board of directors. They further argued for dismissal since in previous cases Section 8 charges had been dropped when the interlocks were voluntarily severed. The Commission determined on January 16, 1973 that respondents were not entitled to dismissal for mootness and that normal consent negotiations should proceed.

1. FILE NUMBER: C-2477 General Electric Company

2. DATE OPENED: March 13, 1973

3. COMPLAINT ISSUED? January 9, 1974

4. ORDER ISSUED? January 9, 1974

4A. IF SO, WHAT WERE ITS TERMS?
1. Prohibited director interlocks with a named competitor.
2. Required for 5 years that each director and prospective director provide respondent with name, address, and annual report of each company having capital, surplus or undivide profits in excess of $1,000,000 of which that person is a director. Based upon such reports, Respondent prohibited from permitting any person to serve as a director who is also a director of a competitor.
3. Required notification of any change in corporate responden
4. Required compliance report.

5. IF NOT,

5A. DATE CLOSED:

5B. REASON (IF ANY) FOR CLOSING:

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED?
Resigned

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS? March 22, 1973 after receiving the Commission's Part II complaint.

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? The files contain no indication of notice to respondents prior to receipt of the Part II complaint dated March 15, 1973.

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE?
Several meetings with respondents to discuss terms of the orde

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS? Above consent order.

1. FILE NUMBER: C-2484 Chrysler Corporation

2. DATE OPENED: March 13, 1973

3. COMPLAINT ISSUED? January 9, 1974

4. ORDER ISSUED? January 9, 1974

4A. IF SO, WHAT WERE ITS TERMS?
1. Prohibited director interlocks with a named competitor.
2. Required for 5 years that each director and prospective director provide respondent with name, address, and annual report of each company having capital, surplus or undivide profits in excess of $1,000,000 of which that person is a director. Based upon such reports, Respondent prohibited from permitting any person to serve as a director who is also a director of a competitor.
3. Required notification of any change in corporate responden
4. Required compliance report.

5. IF NOT,

5A. DATE CLOSED:

5B. REASON (IF ANY) FOR CLOSING:

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED?
Resigned

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS? March 22, 1973 after receiving the Commission's Part II complaint.

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? The files contain no indication of notice to respondents prior to receipt of the Part II complaint dated March 15, 1973.

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE?
Several meetings with respondents to discuss terms of the ord

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS? Above consent order.

1. FILE NUMBER: C-3542 Lear, Siegler Inc. and Royal Industries, Inc.

2. DATE OPENED: May 3, 1973

3. COMPLAINT ISSUED? Sept. 4, 1974

4. ORDER ISSUED? Sept. 4, 1974

4A. IF SO, WHAT WERE ITS TERMS?
1. Respondents prohibited from permitting interlocking directors.
2. Required for 5 years statements from each director listing name and products of each company having capital, surplus and undivid profits in excess of $1,000,000 of which such person is a direct
3. Received similar statements from all prospective directors 30 da prior to election.
4. Prohibited respondent for 5 years from permitting any person to be a director who fails to provide the required statements or whose statements indicate that person is a director of a competing company.
5. Required notification of any change in corporate respondent.
6. Required compliance report

5. IF NOT,

5A. DATE CLOSED:

5B. REASON (IF ANY) FOR CLOSING:

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED?
Two interlocking directors resigned

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS? May, 1973 after consent negotiations were opened.

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? Yes, by letter dated May 15, 1973.

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE? Part II complaint followed by discussions with respondents

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS? Above consent order

1. FILE NUMBER: -2684 Standard Oil Compa

2. DATE OPENED: Feb. 11, 1974

3. COMPLAINT ISSUED? July 17, 1975

4. ORDER ISSUED? July 17, 1975

4A. IF SO, WHAT WERE ITS TERMS?

1. Prohibited director interlock with a named competitor.
2. Required for a 5 year period written statements from each director listing all other businesses with certain limited exceptions in which that person is a director.
3. Required for a 5 year period written statements similar to those in No. 2 above from each person being considered as a director.
4. Prohibited for a 5 year period any person from being a director who fails to provide the required statements or whose statement reveals that person is a director of a competing company.
5. Required notification of any change in corporate respondent.
6. Required the filing of a compliance report and the statements required in No. 2 and No. 3 above.

5. IF NOT,

5A. DATE CLOSED:

5B. REASON (IF ANY) FOR CLOSING:

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED? Resigned

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS?
July 26, 1974 during negotiations.

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY?
No

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE?

Part II complaint followed by discussions with respondent

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS?
Above consent order

1. FILE NUMBER: 2685 Diamond Shamrock Cc .

2. DATE OPENED: Feb. 11, 1974

3. COMPLAINT ISSUED? July 17, 1975

4. ORDER ISSUED? July 17, 1975

4A. IF SO, WHAT WERE ITS TERMS?
1. Prohibited director interlock with a named competitor.
2. Required for a 5 year period written statements from each director listing all other businesses with certain limited exceptions in whic that person is a director.
3. Required for a 5 year period written statements similar to those in No. 2 above from each person being considered as a director.
4. Prohibited for a 5 year period any person from being a director who fails to provide the required statements or whose statement reveals that person is a director of a competing company.
5. Required notification of any change in corporate respondent.
6. Required the filing of a compliance report and the statements required in No. 2 and No. 3 above.

5. IF NOT,

5A. DATE CLOSED:

5B. REASON (IF ANY) FOR CLOSING:

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED? Resigned

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS?
July 26, 1974 during negotiations

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? No

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE?
Part II complaint followed by discussions with respondent

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS?
Above consent order

1. FILE NUMBER: ( )686 Amerada Hess Corp.

2. DATE OPENED: March 21, 1974

3. COMPLAINT ISSUED? July 17, 1975

4. ORDER ISSUED? July 17, 1975

4A. IF SO, WHAT WERE ITS TERMS?

1. Prohibited director interlock with a named competitor.
2. Required for a 5 year period written statements from each director listing all other businesses with certain limited exceptions in which that person is a director.
3. Required for a 5 year period written statements similar to those in No. 2 above from each person being considered as a director.
4. Prohibited for a 5 year period any person from being a director who fails to provide the required statements or whose statement reveals that person is a director of a competing company.
5. Required notification of any change in corporate respondent.
6. Required the filing of a compliance report and the statements required in No. 2 and No. 3 above.

5. IF NOT,

5A. DATE CLOSED:

5B. REASON (IF ANY) FOR CLOSING:

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED?

Resigned

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS?

Feb. 10, 1975 during course of negotiations

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? No

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE?

Part II complaint followed by discussions with respondent

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS?

Aboce consent order

1. FILE NUMBER: [illegible]687 Newmont Mining Corp.

2. DATE OPENED: March 21, 1974

3. COMPLAINT ISSUED? July 17, 1975

4. ORDER ISSUED? July 17, 1975

4A. IF SO, WHAT WERE ITS TERMS?
1. Prohibited director interlock with a named competitor.
2. Required for a 5 year period written statements from each director listing all other businesses with certain limited exceptions in which that person is a director.
3. Required for a 5 year period written statements similar to those in No. 2 above from each person being considered as a director.
4. Prohibited for a 5 year period any person from being a director who fails to provide the required statements or whose statement reveals that person is a director of a competing company.
5. Required notification of any change in corporate respondent.
6. Required the filing of a compliance report and the statements required in No. 2 and No. 3 above.

5. IF NOT,

5A. DATE CLOSED:

5B. REASON (IF ANY) FOR CLOSING:

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED?
Resigned

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS?

Feb. 10, 1975 during course of negotiations

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? No

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE? Part II complaint followed by discussions with respondent

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS? Aboce consent order

1. FILE NUMBER: C- 88 El Paso Natural Gas pany

2. DATE OPENED: March 21, 1974

3. COMPLAINT ISSUED? July 17, 1975

4. ORDER ISSUED? July 17, 1975

4A. IF SO, WHAT WERE ITS TERMS?
1. Prohibited director interlock with a named competitor.
2. Required for a 5 year period written statements from each director listing all other businesses with certain limited exceptions in which that person is a director.
3. Required for a 5 year period written statements similar to those in No. 2 above from each person being considered as a director.
4. Prohibited for a 5 year period any person from being a director who fails to provide the required statements or whose statement reveals that person is a director of a competing company.
5. Required notification of any change in corporate respondent.
6. Required the filing of a compliance report and the statements required in No. 2 and No. 3 above.

5. IF NOT,

5A. DATE CLOSED:

5B. REASON (IF ANY) FOR CLOSING:

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED?
Resigned

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS?
Both directors resigned August 27, 1974 after being advised of the Commission intent to file a complaint.

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? No

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE?
Part II complaint followed by discussions with respondent

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS? Above consent order

1. FILE NUMBER: 2689 Transcontinental Ga Pipe Line Corporation

2. DATE OPENED: March 21, 1974

3. COMPLAINT ISSUED? July 17, 1975

4. ORDER ISSUED? July 17, 1974

4A. IF SO, WHAT WERE ITS TERMS?
1. Prohibited director interlock with a named competitor.
2. Required for a 5 year period written statements from each director listing all other businesses with certain limited exceptions in whic that person is a director.
3. Required for a 5 year period written statements similar to those in No. 2 above from each person being considered as a director.
4. Prohibited for a 5 year period any person from being a director who fails to provide the required statements or whose statement reveals that person is a director of a competing company.
5. Required notification of any change in corporate respondent.
6. Required the filing of a compliance report and the statements required in No. 2 and No. 3 above.

5. IF NOT,

5A. DATE CLOSED:

5B. REASON (IF ANY) FOR CLOSING:

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED? RESIGNED

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS?
Both directors resigned August 27, 1974 after being advised of the Commissions intent to file a complaint

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? No

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE? Part II complaint followed by discussions with respondent

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS?
Above consent order

1. FILE NUMBER: C-2690 Dixilyn Corp.

2. DATE OPENED: April 22, 1974

3. COMPLAINT ISSUED? July 17, 1975

4. ORDER ISSUED? July 17, 1975

4A. IF SO, WHAT WERE ITS TERMS?
1. Prohibited director interlock with a named competitor.
2. Required for a 5 year period written statements from each director listing all other businesses with certain limited exceptions in which that person is a director.
3. Required for a 5 year period written statements similar to those in No. 2 above from each person being considered as a director.
4. Prohibited for a 5 year period any person from being a director who fails to provide the required statements or whose statement reveals that person is a director of a competing company.
5. Required notification of any change in corporate respondent.
6. Required the filing of a compliance report and the statements required in No. 2 and No. 3 above.

5. IF NOT,

5A. DATE CLOSED:

5B. REASON (IF ANY) FOR CLOSING:

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED? RESIGNED

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS?
August 26, 1974 during course of negotiations

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? No

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE? Part II complaint followed by discussions with respondent.

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS? Above consent order.

1. FILE NUMBER: 2691 Austral Oil Company, Inc.

2. DATE OPENED: April 22, 1974

3. COMPLAINT ISSUED? July 17, 1975

4. ORDER ISSUED? July 17, 1975

4A. IF SO, WHAT WERE ITS TERMS?
1. Prohibited director interlock with a named competitor.
2. Required for a 5 year period written statements from each director listing all other businesses with certain limited exceptions in whic that person is a director.
3. Required for a 5 year period written statements similar to those in No. 2 above from each person being considered as a director.
4. Prohibited for a 5 year period any person from being a director who fails to provide the required statements or whose statement reveals that person is a director of a competing company.
5. Required notification of any change in corporate respondent.
6. Required the filing of a compliance report and the statements required in No. 2 and No. 3 above.

5. IF NOT,

5A. DATE CLOSED:

5B. REASON (IF ANY) FOR CLOSING:

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED? RESIGNED

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS?
August 26, 1974 during course of negotiations

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? No

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE? Part II complaint
followed by discussions with respondent

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS? Above consent order

1. FILE NUMBER: C- 92 General American Oil Company of Texas

2. DATE OPENED: April 22, 1974

3. COMPLAINT ISSUED? July 17, 1975

4. ORDER ISSUED? July 17, 1975

4A. IF SO, WHAT WERE ITS TERMS?
1. Prohibited director interlock with a named competitor.
2. Required for a 5 year period written statements from each director listing all other businesses with certain limited exceptions in which that person is a director.
3. Required for a 5 year period written statements similar to those in No. 2 above from each person being considered as a director.
4. Prohibited for a 5 year period any person from being a director who fails to provide the required statements or whose statement reveals that person is a director of a competing company.
5. Required notification of any change in corporate respondent.
6. Required the filing of a compliance report and the statements required in No. 2 and No. 3 above.

5. IF NOT,

5A. DATE CLOSED:

5B. REASON (IF ANY) FOR CLOSING:

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED? RESIGNED

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS?
October 31, 1974 during negotiations

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? No

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE? Part II complaint followed by discussions with respondents

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS?
Above consent order

1. FILE NUMBER: 2693 Pauley Petroleum

2. DATE OPENED: April 22, 1974

3. COMPLAINT ISSUED? July 17, 1975

4. ORDER ISSUED? July 17, 1975

4A. IF SO, WHAT WERE ITS TERMS?
1. Prohibited director interlock with a named competitor.
2. Required for a 5 year period written statements from each director listing all other businesses with certain limited exceptions in which that person is a director.
3. Required for a 5 year period written statements similar to those in No. 2 above from each person being considered as a director.
4. Prohibited for a 5 year period any person from being a director who fails to provide the required statements or whose statement reveals that person is a director of a competing company.
5. Required notification of any change in corporate respondent.
6. Required the filing of a compliance report and the statements required in No. 2 and No. 3 above.

5. IF NOT,

5A. DATE CLOSED:

5B. REASON (IF ANY) FOR CLOSING:

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED? RESIGNED

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS?
October 31, 1974 during negotiations

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? No

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE? Part II complaint followed by discussions with respondents

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS?

Above consent order

1. FILE NUMBER: C- 94 Kerr-McGee Corp.

2. DATE OPENED: April 22, 1974

3. COMPLAINT ISSUED? July 17, 1975

4. ORDER ISSUED? July 17, 1975

4A. IF SO, WHAT WERE ITS TERMS?
1. Prohibited director interlock with a named competitor.
2. Required for a 5 year period written statements from each director listing all other businesses with certain limited exceptions in which that person is a director.
3. Required for a 5 year period written statements similar to those in No. 2 above from each person being considered as a director.
4. Prohibited for a 5 year period any person from being a director who fails to provide the required statements or whose statement reveals that person is a director of a competing company.
5. Required notification of any change in corporate respondent.
6. Required the filing of a compliance report and the statements required in No. 2 and No. 3 above.

5. IF NOT,

5A. DATE CLOSED:

5B. REASON (IF ANY) FOR CLOSING:

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED?
RESIGNED

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS?
July 1, 1974 during negotiations

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? No

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE?
Part II complaint followed by discussions with respondents.

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS?
Above consent order

1. FILE NUMBER: C- 395 Oklahoma Natural Gas Company

2. DATE OPENED: April 22, 1974

3. COMPLAINT ISSUED? July 17, 1975

4. ORDER ISSUED? July 17, 1975

4A. IF SO, WHAT WERE ITS TERMS?

1. Prohibited director interlock with a named competitor.
2. Required for a 5 year period written statements from each director listing all other businesses with certain limited exceptions in which that person is a director.
3. Required for a 5 year period written statements similar to those in No. 2 above from each person being considered as a director.
4. Prohibited for a 5 year period any person from being a director who fails to provide the required statements or whose statement reveals that person is a director of a competing company.
5. Required notification of any change in corporate respondent.
6. Required the filing of a compliance report and the statements required in No. 2 and No. 3 above.

5. IF NOT,

5A. DATE CLOSED:

5B. REASON (IF ANY) FOR CLOSING:

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED? RESIGNED

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS?

July 1, 1974 during negotiations

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? No

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE? Part II complaint followed by discussions with respondents

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS?

Above consent order

1. FILE NUMBER: 631 0629

2. DATE OPENED: June 24, 1963

3. COMPLAINT ISSUED? No

4. ORDER ISSUED? No

4A. IF SO, WHAT WERE ITS TERMS?

5. IF NOT,

5A. DATE CLOSED: April 15, 1969

5B. REASON (IF ANY) FOR CLOSING: The investigation disclosed that one respondent corporation had withdrawn from competition with the second respondent corporation.

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED? Unknown

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS?

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? Yes. The interlock was brought to the Commission's attention by one of the corporations. The other parties were informed of the investigation.

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE? Unknown

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS?

Collected for Mr. Paul
from Mr. Battistone 3-29-76

1. FILE NUMBER: CH4 0038

2. DATE OPENED: 5-30-74 (by the Bureau, not the Commission)

3. COMPLAINT ISSUED? No.

4. ORDER ISSUED? No.

4A. IF SO, WHAT WERE ITS TERMS? N.A.

5. IF NOT,

5A. DATE CLOSED: 12-29-75 (by the Bureau, not the Commission).

5B. REASON (IF ANY) FOR CLOSING: The investigation was an inquiry into interlocks between banks and insurance companies. It was closed because of Department of Justice involvement in the area and because the staff did not want to address potential jurisdiction problems at this time.

6. DID THE DIRECTOR RESIGN, OR WAS HE OR SHE TERMINATED? N.A.

6A. IF SO, WHEN DURING THE COURSE OF THE PROCEEDINGS?

7. WERE PROPOSED RESPONDENTS INFORMED OF THE INVESTIGATION PRIOR TO ISSUANCE OF THE COMPLAINT, IF ANY? No.

8. WHAT ATTEMPTS AT NEGOTIATIONS WERE MADE? N.A.

8A. WHAT WAS THE OUTCOME OF THOSE NEGOTIATIONS?

EXHIBIT B

Schedule of Number of
Interlocks and Companies
Involved in Investigations
and Proceedings Summarized
in Exhibit A.

Respondent next argues that its constitutional

601 0034	6 common directors between 2 corp.
611 0196	1 " " " " "
621 0821	1 " " " " "
621 0840	1 " " " " "
621 0841	1 " " " " " [same 2 corporations as in 621 0840]
631 0626	1 common director between 2 corp.
631 0629	1 " " (owner) " " "
651 0619	1 " " " " "
651 0622	1 " " " " "
651 0630	1 " " " " "
651 0631	1 " " " " "
651 0632	1 " " " " "
651 0636	1 " " " " "
651 0637	1 " " " " "
651 0647	2 " " " " "
661 0604	1 " " " " "
661 0615	1 " " " " "
711 0063	2 directors in a vertical interlock
721 0601	2 common directors between 2 corp.
731 0024	indirect interlocks between 3 competitive corporations and 1 bank
731 0031	vertical interlocks between 1 raw goods supplier, 1 manufacturer and 2 retailers
741 0032	2 common directors between 2 corpor.

C-2415 & C-2416	1 common director between Aluminum Company of America & ARMCO
C-2417 & C-2418	1 common director between Aliminum Company of America & Kennecott
C-2477 & C-2484	1 common director between General Electric Company and Chrysler Corp.
C-2542	2 common directors between Lear Siegler, Inc. and Royal Industries, Inc.
C-2684 & C-2685	1 common director between Standard Oil Co. (Ohio) and Diamond Shamrock Corp.
C-2686 & C-2687	1 common director between Amera Hess Corp and Newmont Mining Corp.
C-2688 & C-2689	2 common directors of El Paso Natural Gas Company and Transcontinental Gas Pipe Line Corp.
C-2690 & C-2691	1 common director between Dixilyn Corp. and Austral Oil Co.
C-2692 & C-2693	1 common director between General American Oil Company of Texas and Pauley Petroleum, Inc.
C-2694 & C-2695	1 common director between Kerr-McGee Corp. and Oklahoma Natural Gas Co.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	
KRAFTCO, INC., a corporation,	
SCM CORPORATION, a corporation,	DOCKET NO. 9035
and	
RICHARD C. BOND, an individual.	

ORDER AMENDING FINAL ORDER OF APRIL 13, 1976

In my order of April 13, 1976, I stated that this matter will be submitted for initial decision on the basis of a factual stipulation to be filed on April 29, 1976. After reviewing this stipulation, the proposed findings and briefs filed on May 10, 1976 and on the basis of a conference call with the parties on May 21, 1976, this earlier order is amended. In addition to the stipulation filed in the Secretary's office on April 29, 1976, I will rely on (1) the pleadings (i.e., the complaint and answer of Kraftco Corporation and SCM Corporation) and (2) the affidavits which were filed by complaint counsel and SCM Corporation in connection with earlier motions for summary decision.

At the request of complaint counsel, and without objection by respondent SCM, the date for the filing of reply findings and answering briefs is changed to June 3, 1976.

Morton Needelman
Administrative Law Judge

May 21, 1976

Filed: June 17, 1976

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	
KRAFTCO CORPORATION, a corporation,	
SCM CORPORATION, a corporation,	DOCKET NO. 9035
and	
RICHARD C. BOND, an individual.	

INITIAL DECISION

Morton Needelman, Administrative Law Judge

Ronald A. Bloch, Esq.,
Joseph Tasker, Jr., Esq.,
Counsel Supporting the Complaint.

Sullivan & Cromwell
by William E. Willis, Esq.,
Marcia B. Paul,
New York, New York
Counsel for Respondent SCM Corporation.

I

STATEMENT OF THE CASE

The Commission's complaint in this proceeding issued on June 17, 1975. It charges Kraftco Corporation 1/ (hereinafter "Kraftco"), SCM Corporation (hereinafter "SCM"), and an individual, Richard C. Bond (hereinafter "Bond") with violating Section 8 of the Clayton Act (15 U.S.C. § 19), 2/ and Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45) 3/ by reason of an unlawful interlocking directorate. According to the complaint, Bond served simultaneously on the Board of Directors of Kraftco and SCM which compete in the sale of margarine, edible oils, and barbecue sauce. The complaint further alleges that each corporate respondent has capital, surplus, and undivided profits aggregating more than one million dollars.

Kraftco and Bond have entered into consent settlements. 4/ The remaining issue in this case is the liability of SCM.

1/ Incorrectly captioned "Kraftco, Inc." in the complaint. See Answer of Kraftco Corporation, ¶ 2.

2/ Section 8 provides as follows with respect to interlocking directorates:

> ...[N]o person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, ...if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination, of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.

3/ Section 5 of the Federal Trade Commission Act prohibits unfair methods of competition and unfair and deceptive acts or practices.

4/ The Commission accepted a consent settlement from Bond on April 26, 1976. Kraftco's consent agreement was provisionally accepted by the Commission and placed on the public record for 60 days comment on May 6, 1976.

SCM's answer, dated November 17, 1975, admits certain complaint allegations respecting corporate identity. The answer also admits that SCM's capital, surplus, and individual profit aggregate more than one million dollars and that it is engaged in commerce, as "commerce" is defined in both the Clayton Act and the Federal Trade Commission Act. SCM's answer denies that Bond was a member of its Board of Directors at the time the answer was filed, but admits that prior to August 1, 1975. he was on SCM's Board. SCM's answer also admits the sale of certain food products, but denies knowledge sufficient to form a belief as to the allegations of the complaint respecting competition between it and Kraftco. SCM's answer then asserts several affirmative defenses, to wit: 1) the complaint fails to state a claim upon which relief could be granted, 2) Bond's resignation from SCM's Board renders the case moot, 3) competition, if any, between Kraftco and SCM is de minimis and not within the statutory purpose of the anti-interlock law, 4) the Commission lacks jurisdiction over SCM because Section 8 applies only to individuals and not to the corporations themselves, and 5) respondent's due process and equal protection rights have been violated by the Commission's uneven and discriminatory enforcement of Section 8. Concurrently with the filing of its answer, SCM moved for summary decision on the same grounds as those asserted as affirmative defenses. On December 1, 1975, complaint counsel filed a cross-motion for summary decision. 5/

A prehearing conference was held on December 19, 1975. After hearing oral argument on cross-motions for summary judgment, the Administrative Law Judge suggested that the basic facts of the case should be stipulated and a decision could then be rendered on the basis of the stipulation. The parties agreed to follow this course of action, and on April 29, 1976, a factual stipulation was filed. On May 10, 1976, proposed findings and supporting briefs were filed by both parties, and replies were filed on June 3, 1976.

5/ Complaint counsel renewed this motion in its Supplementary Memorandum of Law In Support of Complaint Counsel's Motion For Summary Decision and In Opposition to SCM's Motion To Dismiss (May 10, 1976). In view of my disposition of this matter on the merits by relying on a stipulated record, I need not address the summary decision question.

On the basis of the factual stipulation, uncontroverted affidavits submitted with the cross-motions for summary decision, and the pleadings, I make the following findings of fact: 6/

II

FINDINGS OF FACT

1. SCM is a New York corporation with its principal office and place of business located at 299 Park Avenue, New York, New York 10017. (SCM Ans., ¶ 2)

2. SCM is a diversified industrial company which manufactures and distributes various products, including typewriters, business equipment, home appliances, paints, resins, food, chemicals, and paper. In fiscal 1975, SCM had total sales of $1,287,000,000. (Stip., ¶ 1; Sexton, Aff. 1, ¶ 4)

3. SCM has capital, surplus, and undivided profits aggregating more than one million dollars. (SCM Ans., ¶ 2)

6/ The following abbreviations are used throughout this initial decision:

"Stip." - Stipulation of April 29, 1976, with ¶ references.

"SCM Ans." - SCM's Answer to Complaint, with ¶ references.

"Kraftco Ans." - Kraftco's Answer to Complaint, with ¶ references.

"Sexton Aff. 1" - Affidavit of Richard Sexton, Vice President and General Counsel of SCM, dated November 11, 1975 and filed with SCM's Motion for Summary Decision Dismissing the Complaint, with ¶ references.

"Sexton Aff. 2" - Affidavit of Richard Sexton, Vice President and General Counsel of SCM, dated December 12, 1975 and filed with SCM's Memorandum of Law in Opposition to Motion by Counsel Supporting the Complaint and In Further Support of Motion by Respondent SCM, with ¶ references.

4. SCM is engaged in commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act. (SCM Ans., ¶ 2)

5. SCM's business includes the manufacture and sale in commerce of margarine, edible oils, and barbecue sauce. (SCM Ans., ¶ 5; Stip. ¶'s 2, 3, 4)

6. Kraftco, a corporation engaged in commerce as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act, has capital, surplus, and undivided profits aggregating more than one million dollars. (Kraftco Ans., ¶ 2) Total Kraftco sales in 1974 were approximately $4,500,000,000. (Sexton Aff. 1, ¶ 4)

7. SCM competes with Kraftco in the sale of margarine, edible oils, and barbecue sauce. Sales by SCM in fiscal 1975 of products sold in competition with Kraftco products were approximately $83 million. 7/ During the same period, Kraftco had sales of products in competition with SCM of approximately $258 million. (Stip., ¶ 1) Specifically, SCM and Kraftco competed as follows in 1975:

(a) SCM sold margarine in 41 states in competition with Kraftco. (Stip., ¶ 2)

(b) SCM sold edible oils in competition with Kraftco in all states. (Stip., ¶ 3)

7/ SCM's total sales of these products in 1975 were approximately $123,552,000, broken down as follows:

$ 643,500	Sales of margarine to industrial bakers
386,100	Sales of margarine to wholesalers
25,740,000	Sales of edible oil to industrial manufacturers of fried snacks
25,740,000	Sales of edible oil to industrial manufacturers of prepared mixes and industrial bakeries
64,350,000	Sales of edible oil to food service industry
6,435,000	Sales of barbecue sauce to retail grocery trade
257,400	Sales of barbecue sauce to food service industry.

(Stip., ¶'s 2, 3, 4)

(c) SCM competed with Kraftco west of the Mississippi River in the sale of barbecue sauce. (Stip., ¶ 4)

(d) SCM and Kraftco have placed advertisements for edible oils, margarine, and barbecue sauce in the same trade publications. (Stip., ¶ 5)

8. Bond became a member of SCM's Board of Directors in 1967 and continued as a director until he submitted his resignation on August 1, 1975. (Sexton Aff. 1, ¶ 6) This resignation was accepted by SCM at the August 21, 1975 meeting of the SCM Board of Directors. (Sexton Aff. 2, ¶ 3) Bond joined the Board of Directors of Kraftco sometime in 1957, and he continues to this day to serve on the Kraftco Board. (Sexton Aff. 1, ¶ 6) SCM does not intend to reappoint Bond to its Board of Directors so long as he is a director of Kraftco or any corporation which competes or might compete in any line of commerce with SCM. (Sexton Aff. 1, ¶ 10)

III

DISCUSSION 8/

On the basis of the factual stipulation submitted by the parties, there is no question that (1) Bond served simultaneously on the Board of Directors of both SCM and Kraftco; 9/ (2) both corporations are engaged in "commerce" and have capital, surplus, and undivided profits aggregating more than $1,000,000; 10/ and

---

8/ References in this section are to the briefs and reply briefs as follows:

"SCM Main Brief" - Memorandum of Law of Respondent SCM Corporation (May 10, 1976).

"SCM Reply Brief" - Reply Memorandum of Law of Respondent SCM Corporation (June 3, 1976).

9/ Finding 8.

10/ Findings 3, 4, and 6.

(3) the two corporations compete. 11/ Respondent SCM, however, contends that there are several defenses to what appears to be an obvious violation of Section 8.

First, respondent says that the Commission lacks jurisdiction over SCM because the prohibitions of Section 8 of the Clayton Act are directed exclusively to individuals. According to respondent, there is nothing in Section 8 which says it is illegal for corporations to have interlocking directors; the statute, respondent asserts, is directly solely to individuals serving on two interlocking corporations. SCM Main Brief, pp. 16-23; SCM Reply Brief, p. 8.

While corporations have been held liable in Section 8 proceedings, See, e.g., United States v. Sears, Roebuck and Co., 111 F. Supp. 614 (S.D.N.Y. 1953), it is true that in the only Supreme Court decision on the anti-interlock provisions of the Clayton Act, the Supreme Court specifically reserved judgment on the question of corporate liability. 12/ Notwithstanding the lack of a definitive Supreme Court holding or the absence of legislative history directly in point, I believe that the language of Section 11(b) of the Clayton Act disposes of respondent's argument. This section says that the Commission shall issue orders requiring a "person" (defined in Section 1 of the Clayton Act as including corporations) to cease and desist from violations of the Act, including Section 8, and to "rid itself of the directors chosen contrary to the provisions of...section 8." Since the only "person" that could logically "rid itself" of directors is a corporation, by its terms, the statute gives the Commission jurisdiction over corporations. 13/

11/ Finding 7.

12/ United States v. W. T. Grant Co., 345 U.S. 629 at 634, n. 9 (1953).

13/ The section reads, in pertinent part, as follows:

> "If...the Commission...shall be of the opinion that any of the provisions of said sections [including Section 8] have been or are being violated, it shall...issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 7 and 8 of this Act, if any there be, in the manner and within the time fixed by said order." 15 U.S.C. 21 [Emphasis added]

Despite the clear language of Section 11 respecting the powers of the Commission, respondent argues that this section is merely "procedural" and that only Section 8 "defines" the offense. SCM Main Brief, p. 20. Such a bifurcated reading of this legislation, which would effectively eliminate most of Section 11, conflicts with the accepted principles of construction that separate parts of a single statute should be harmonized and construed together (See Clark v. Uebersee Finanz-Korp., 332 U.S. 480, 488 (1947)) and that no parts of a statute are to be denied significance and effect. Ex Parte Public Bank, 278 U.S. 101, 104 (1928).

As for respondent's argument that the subject language in Section 11 is a "vestigial" carry-over from the pre-1935 version of Section 8 which expressly prohibited banks from having interlocking directorates (SCM Main Brief, p. 21), not only is this a strained interpretation of inapposite legislative history, but also a strong argument could be made that the 1935 amendments, which were intended to strengthen rather than weaken Section 8 by removing the discretion of the Governors of the Federal Reserve System to allow interlocks (See, STAFF OF ANTITRUST SUBCOMM. OF HOUSE COMM. ON THE JUDICIARY, 89th Cong., 1st Sess., Report on Interlocks in Corporate Management 23-24 (Comm. Print 1965)), left intact the power of the Federal Reserve System, as indicated in Section 11, to continue to prohibit banks from having interlocks. In any event, whatever the reach of the Federal Reserve System after the 1935 amendments may or may not be over banks, there is no legislative history cited by respondent which can be even remotely interpreted as saying that one should ignore what Congress expressly said in Section 11 about the jurisdiction of the Federal Trade Commission to enforce Section 8 against corporations.

Moreover, going beyond its plain language, Section 11 cannot be interpreted in such a way as to frustrate the very purpose and objective of Section 8. 14/ But this is precisely what would happen if corporations, as respondent urges, could not be held accountable for Section 8 violations. Congress intended by Section 8

14/ A statute should be construed by looking to its object and underlying policy. As the Supreme Court recently said, "Our objective...is to ascertain the Congressional intent and give effect to the legislative will." Philbrook v. Glodgett, 421 U.S. 707, 713 (1975).

"to nip in the bud incipient violations of the anti-trust laws by removing the opportunity or temptation to such violations through interlocking directorates." United States v. Sears, Roebuck and Co., 111 F. Supp. 614, 616 (S.D.N.Y. 1953). An interpretation of Sections 8 and 11 which allows corporations to seat interlocking directorates, reap the anticompetitive benefits, and then possibly appoint new interlocking directors after each violation is uncovered would transform a statute aimed at preventing full-blown antitrust violations into a license giving corporations multiple opportunities for achieving actual anti-competitive results.

Respondent further contends that even if Section 11 does give the Commission jurisdiction over a corporation, the same section limits relief to an order requiring the corporation to rid itself of the director chosen contrary to the provisions of Section 8 of the Act. SCM Main Brief, p. 20. Respondent then argues that since no unlawful interlocking directorate now exists (Bond resigned from the SCM Board after complaint issued), Section 11 cannot be invoked as the basis for a cease and desist order. This contention also totally ignores the clear language of Section 11 which not only allows the Commission to require a corporation to rid itself of the offending directors, but also authorizes the Commission to issue "an order requiring such person [including a corporation] to cease and desist from such violations." Thus, Section 11 relief is not limited to orders simply requiring removal of the director who was a participant in the unlawful interlock, and even if the director has been removed, an appropriate order to cease and desist may be entered. In addition, it has been held that Commission's remedial powers under Section 11 to issue a cease and desist order governing future conduct are as broad as its general equitable powers under Section 5 of the Federal Trade Commission Act, and "the question to be asked in fashioning a remedy should be: What kind of order, within the broad range of an equity court's remedial powers, would, in the particular circumstances, be most effective to 'cure the ill effects of the illegal conduct, and assure the public freedom from its continuance.'" Ecko Products Co., 65 F.T.C. 1163,

1215 (1964), aff'd., 347 F.2d 745 (7th Cir. 1965. 15/

Next, respondent argues that issuance of an order in this case is not required because the "nature and magnitude of the competition, such as it is, between SCM and Kraftco, is not 'actual and substantial' as that term has been repeatedly used in the antitrust laws" and that an interlock between SCM and Kraftco, "in no material manner adversely affects [the] public interest." SCM Main Brief, pp. 35-36; SCM Reply Brief, p. 5. This argument misconceives the purpose of Section 8 while at the same time ignoring the stipulated facts.

Given the fact that the parties have stipulated to a competitive overlap between Kraftco and SCM in the sale of margarine, edible oils, and barbecue sauce, the issue of competition has been removed from the case. The statute is violated whenever the technical requirements of "commerce" and jurisdictional amount are met, and the companies are in a competitive relationship where there is a potential for an agreement between them which would violate any of the antitrust laws, for example, a division of territory or a price-fix relating to the sale of edible oil. There is no need under this statute to have an elaborate market analysis, and evidence of actual effects on competition is unnecessary. Protectoseal Company v. Barancik, 484 F.2d 585 (7th Cir. 1973); United States v. Sears, Roebuck and Co., 111 F. Supp. 614 (S.D.N.Y. 1953).

15/ While Ecko dealt specifically with the question of the power of the Commission to ban future acquisitions under Section 11 after a Section 7 violation has been proven, the decision touched generally on the similarity between a Section 11 cease and desist order (including orders aimed at interlocks) and the remedial scope of Section 5 (See 65 F.T.C. 1215, footnote 9). The decision indicates that both statutes are now to be read broadly, not only because of the 1950 amendments to the merger law, but also for the reason that FTC v. Eastman Kodak Co., 274 U.S. 619 (1927), which limited the scope of cease and desist orders, has for all practical purposes been overruled by Pan American World Airways v. United States, 371 U.S. 296, 312 and notes 17, 18 (1963).

On the question of the substantiality of the competitive overlap, the court noted in Sears, Roebuck that Congress had provided Section 8 with "its own substantiality standard in the form of the one million dollar size requirement." 16/ But even assuming that there may be some minimum amount of competitive overlap below which no violation should be found, 17/ the issue simply does not arise in this case. SCM and Kraftco do not come within any conceivable application of a de minimis rule, even if one were applicable here, since the competitive overlap between respondent and Kraftco was approximately $340 million in 1975. SCM's share of those sales, $83 million, is substantial by any measure. 18/

16/ 111 F. Supp. at 619.

17/ A strong argument can be made that there is no de minimis defense in a Section 8 case because the statute prohibits interlocks where the competitive relationship is such that elimination of competition by agreement would violate any of the provisions of any of the antitrust laws. Such an agreement would include price-fixing which is illegal regardless of the amount involved. Kramer, Interlocking Directorships and the Clayton Act After 35 Years, 59 Yale L.J. 1266 at 1269 (1950). But see Paramount Pictures Corp. v. Baldwin-Montrose Chemical Co., 1966 Trade Cases, ¶ 71,678 (S.D.N.Y. 1966) which speaks of "de minimis competition" in the context of a Section 8 case where the competitive overlap was not only small, but also would not readily lend itself to a possible price-fix or a market allocation.

18/ As the court said in Sears, Roebuck "Surely, the sales of $80,000,000 do not come within the de minimis principle," 111 F. Supp. 614 at 621, and "The fact that this volume of sales may represent but a small percentage of either or both of the corporate defendants' annual sales, or a fraction of the annual retail sales of all distributors in the country of those commodities, does not militate against the undesirability of directorates common to both corporations." Id. at 620.

Respondent next argues that its constitutional rights to due process and equal protection of the laws have been violated by the Commission's departure from an established procedure generally taken with regard to Section 8. Respondent says that the Commission's prior practice has been to seek voluntary termination of interlocking directorates and then to dismiss the action after resignation of the challenged director. According to respondent, the Commission's failure to follow this procedure here is arbitrary and discriminatory. SCM Main Brief, pp. 23-34; SCM Reply Brief, pp. 8-9. This argument, too, is without merit.

The facts of the matter are that the Commission has used various methods in enforcing Section 8. It is true that between 1960 and 1966, the Commission closed eleven Section 8 investigations after termination of the offending interlocks, and that in none of the pre-1966 cases was a formal consent order executed. 19/ But apparently this policy did not accomplish what Congress set out to do. As a result, in all formal complaint proceedings initiated since 1972, corporate respondents have routinely been required to enter into consent agreements even though the interlocks have been terminated. 20/ Clearly, the Commission has the right, even the duty, to change procedures if it finds that informal settlements are not producing an adequate level of compliance. In any event, respondent's bald assertion that the Commission's practice is to dismiss actions after termination of the interlocks is in error since this has not been the Commission policy as revealed in the stipulated facts.

As for respondent's argument that SCM was discriminated against because it received "no notice whatsoever of the Commission's intention to file a complaint prior to issuance thereof" (SCM Main Brief, p. 27), there has never been a requirement in the Commission's rules that

---

19/ Exhibit "A" to Stip. One formal complaint issued during this period, Dierks Forests, 58 F.T.C. 304 (1961). The complaint was dismissed after the interlocking director resigned.

20/ Between 1972 and 1975, the Commission issued 19 formal complaints charging corporations with violation of Section 8. Each of these cases resulted in a consent settlement directed at corporate responsibility for compliance with Section 8. (Exhibit "A" to Stip.)

any such advance notice be given. 21/ But as it happens, SCM did receive notice of the Commission's interest in a possible illegal interlock prior to issuance of the complaint. 22/ There is no indication, however, that this notice, which SCM now regards as so imperative, inspired any pre-complaint action on the part of respondent to rid itself of Mr. Bond, or to prevent reoccurrence of Section 8 violations.

Finally, respondent maintains that this action has been rendered moot by the "voluntary" resignation of Bond from the Board of Directors of SCM after the complaint was issued. Although respondent itself recognizes that the mere discontinuance of an illegal act, particularly discontinuance after an investigation or formal action has begun, does not render a case moot, SCM contends that the surrounding facts demonstrate that no relief is necessary and the action must be dismissed as moot. SCM Main Brief, pp. 6-16.

21/ Prior to April 4, 1975, the Commission issued, but was not required to do so, "proposed complaints" under Part 2 of its rules for the purpose of encouraging consent settlements before a formal complaint was issued. After April 4, 1975, all complaints (including this one) were issued under Part 3. If a consent settlement is negotiated in the investigation stage, the complaint and consent settlement may be issued simultaneously. See 40 Fed. Reg., No. 60, p. 15235 (April 4, 1975). Respondent seems to be suggesting that under the new rules, which abolished Part 2, it has been treated differently than other Section 8 respondents because it has not been given an opportunity to have its complaint and consent order entered simultaneously. SCM Main Brief, pp. 27-28. In the first place, and contrary to respondent's representation, in Kane-Miller, Dkt. 9034, the Part 3 complaint alleging a Section 8 violation (issued on June 17, 1975 and not on July 17, 1975 as respondent asserts) was not accompanied by consent settlements. The matter was withdrawn from adjudication on December 19, 1975 for the purpose of considering consent agreements signed in October and November, 1975. Secondly, respondent's argument on this point is obscure, to say the least, since there is no indication that it wished to enter into a consent settlement at any stage of this proceeding.

22/ On March 7, 1975. (Sexton Aff. 1, ¶ 8)

On the general question of mootness (and in the very context of a Section 8 case) the Supreme Court said in United States v. W. T. Grant, 345 U.S. 629 (1953), that "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot." Id. at 632. The Supreme Court added, however, that an action can be moot if the defendant can demonstrate "there is no reasonable expectation that the wrong will be repeated," but the burden of doing so "is a heavy one." Id. at 633.

In the instant case, the points cited by SCM to meet this "heavy" burden are: (1) Bond's immediate "voluntary" resignation and his assurance that he does not intend to serve on respondent's Board while a director of Kraftco; (2) respondent's assurance (by affidavit) that Bond will not be re-elected to SCM's Board while he is a director of Kraftco or any other competitor of respondent; and (3) the lack of evidence of prior Section 8 or related violations by SCM. W. T. Grant establishes, however, that such grounds are insufficient to meet respondent's "heavy" burden in making a mootness defense. In that case, too, the defendant showed that the offending interlock no longer existed and it disclaimed any intention to revive the relationship. But the Supreme Court said that, "such a profession does not suffice to make a case moot although it is one of the factors to be considered in determining the appropriateness of granting an injunction against the now-discontinued acts." Id. at 633.

Despite the clear holding in W. T. Grant that a mootness defense ordinarily will not arise from the mere fact that the director has resigned and the respondent says it will not re-elect the offending director, SCM seeks refuge in the Supreme Court's refusal in that case to interfere with the District Court's denial of injunctive relief. In reviewing the discretionary power of the District Court with respect to injunctive relief, the Supreme Court said in W. T. Grant that it found no abuse of discretion on the facts of that case. But the Supreme Court indicated that the standard for injunctive relief -- "some cognizable danger of recurrent violation, something more than a mere possibility...." (Id. at 633) remains nevertheless, a matter of discretion with the trier of the facts. Thus in subsequent cases the Court has said "[whether] further violations [are] sufficiently remote to make injunctive relief unnecessary...is

a matter for the trial judge." United States v. Phosphate Export Assn., 393 U.S. 199, 203-204 (1968). 23/

The determination of how the trier of the facts -- the Administrative Law Judge, in the first instance, and later the Commission upon review of the record -- should exercise this discretion is not materially advanced by respondent's mere repetition (in various versions) of the refrain "there is no cognizable danger of recurrent violation" (SCM Main Brief, pp. 7, 9, 10, 11, 15, 16; SCM Reply Brief, pp. 2, 3, 4, 10, 13; Sexton Aff. 2, ¶ 8): such self-serving declarations are entitled to no weight, especially when SCM is silent on what steps it has taken to avoid the danger of other unlawful interlocks. 24/ In any event, if respondent's assessment of the danger of recurrence of a violation were the test, then, presumably, the Commission could never issue a cease and desist order in any case. See Hershey Chocolate Corp. v. FTC, 121 F.2d 968, 971 (3d Cir. 1941).

By the same token, respondent does not demonstrate the absence of a danger of recurrence by asserting that it may be caught again if it violates the law. SCM seems to be suggesting that because its selection of directors is a matter of public information and must be reported to the SEC and the New York Stock Exchange that this somehow guarantees against recurrence of the violation. SCM Main Brief, pp. 9, 15-16. The cogency of this argument is somewhat less than compelling since neither these reporting requirements nor public disclosure of Bond's membership on SCM's Board (presumably to SCM's stockholders) prevented the very violation which is the subject of this complaint. Moreover, respondent's position on this point seems to assume it is the function of the public, or its stockholders, or the New York Stock Exchange, or the SEC, or the FTC to protect SCM from

---

23/ See also Treves v. Servel, Inc., 244 F. Supp. 773 at 777 (S.D.N.Y. 1965) where the court relying on W. T. Grant said "Beyond the mootness area lies the more difficult issue whether, as a matter of discretion, the court ought to dismiss plaintiff's request for injunctive relief."

24/ This is not to say that a mere voluntary undertaking by respondent to comply with the law would be an adequate safeguard for the future. Clinton Watch Co. v. FTC, 291 F.2d 838, 841 (7th Cir. 1961), cert. denied, 368 U.S. 952 (1962).

violating the law. To the contrary, the obligation to comply with Section 8 falls squarely on every corporation which meets the statutory requirements.

It is also apparent that neither W. T. Grant nor any other decision relating to the discretionary power of the trier of facts to issue a cease and desist order can be read as meaning that no substantive violation can be found and no order can be issued unless complaint counsel comes forward with proof that respondent is a corporate recidivist. 25/ Such a cavalier approach to Section 8, allowing one or more excused violations, would mean that in administering the antitrust laws one has to assume, contrary to fact, that Congress intended a high level of permissiveness.

As for the language in W. T. Grant that the moving party must persuade the trier of the facts of the need for injunctive relief, this does not mean that once a violation is proven, complaint counsel must then undertake a protracted second trial relating to the remedy. It is significant that on the limited facts before it in W. T. Grant -- the failure of the director to terminate the interlocks despite five years of fruitless negotiation with the Government, the refusal by the director to concede illegality, and his failure to promise not to commit similar violations in the future -- the Supreme Court said "Were we sitting as a trial court, this showing might be persuasive." Id. at 634. That the Supreme Court did not overturn a contrary conclusion by the lower court -- that is, that the District Court was not persuaded -- represents no more than the usual deference, in the absence of a clear showing of abuse, which the appellate body (W. T. Grant was a direct appeal to the Supreme Court) gives to the discretionary injunctive rulings of the trial court. See Brown v. Chote, 411 U.S. 452, 457 (1973).

From the lower court opinion, it is not possible to tell what would have persuaded the District Court in W. T. Grant that an order was indeed required, or how as a practical matter, the Government can hope to show any more than it actually did. Proof on the subject of the likelihood of future violations is bound

---

25/ As the Supreme Court said in W. T. Grant, "The purpose of an injunction is to prevent future violations...and, of course, it can be utilized even without a showing of past wrongs." 345 U.S. 629 at 633.

to be elusive at best since we are dealing with slippery issues of predictability of conduct and how assiduously a company will comply with the law when it is not compelled to do so by an order. To read W. T. Grant, however, as imposing a substantial burden in this respect would effectively frustrate enforcement of Section 8 which was specifically designed by Congress to avoid complex litigation. See Protectoseal v. Barancik, 485 F.2d 585, 589 (7th Cir. 1973). It would also be contrary to the clear holding of the Supreme Court that "once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor." United States v. du Pont & Co., 366 U.S. 316, 334 (1961).

I believe W. T. Grant is properly read as leaving undisturbed what the Supreme Court has consistently said about the broad discretion which the Commission has to determine whether a cease and desist order is needed in order to make certain that an unfair method of competition or illegal trade practice is stopped and not resumed. Jacob Siegel Co. v. FTC, 327 U.S. 608 (1946); FTC v. Mandel Bros., 359 U.S. 385, 392 (1959). The Commission has traditionally exercised this discretion in favor of issuing orders enjoining future violations even where it is certain that the precise acts involved in a case could not be repeated because of statutory revisions or abandonment of the business. See discussion and cases cited in Rubbermaid Inc., Dkt. 8939, 3 CCH Trade Reg. Rep. ¶ 21,131 at pp. 20,985-20,987 (April 13, 1976).

In this case there are no extenuating circumstances or other persuasive reasons for departing from overwhelming Commission precedent in favor of a cease and desist order. Here, as far as one can tell, nothing has been discontinued by SCM (Bond resigned of his own accord when he, too, was named as a respondent) and there is no basis for assuming that meaningful changes in procedures will be made unless respondent is ordered to do so. SCM has insisted all along that as a corporation it is not subject to the prohibitions of Section 8, and it has not even given adequate assurances of voluntary compliance with the law in the selection of directors other than Bond. Surely, whatever SCM did to comply with the law prior to complaint (assuming it did anything) was inadequate since it did not detect or prevent an unlawful interlock with its competitor Kraftco. In sum, I fail to see how the public interest is protected in any way unless SCM is compelled to take positive steps to prevent future recurrence of the same practice.

As for the scope of the order, this is not a case where the remedy proposed by complaint counsel is only loosely connected to the illegal conduct and could only be justified under the "fencing in" rubric of FTC v. National Lead Co., 352 U.S. 419, 431 (1957). The order which follows covers the exact same illegal practice as that charged in the complaint, and merely imposes a monitoring procedure which requires SCM to take certain minimal precautions in selecting directors to avoid interlocks. This is relief which is reasonably related to the unlawful practice which has been alleged and proven. Jacob Siegel Co. v. FTC, 327 U.S. 608 (1946).

IV

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding, and over respondent SCM.

2. Respondent SCM was at all times material herein engaged in commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

3. Respondent SCM Corporation has violated Section 8 of the Clayton Act, 15 U.S.C. § 19, and Section 5 26/ of the Federal Trade Commission Act, 15 U.S.C. § 45, by reason of the following:

(a) Respondent SCM and Kraftco are corporations which each have capital, surplus, and undivided profits aggregating more than $1,000,000.

26/ The complaint alleges a violation of both Section 8 and Section 5 of the Federal Trade Commission Act. I need not decide whether the substantive standard for judging an interlock may be different under Section 5 or whether Section 5 may reach an interlock which violates the policy of the Clayton Act although technically not within the four corners of Section 8. All the requirements of Section 8 have been met in this case, and my conclusion that Section 5 has been violated rests solely on the rule that the Federal Trade Commission Act registers all violations of the Clayton and Sherman Acts. FTC v. Motion Picture Advertising Service Co., 344 U.S. 392, 394-5 (1953).

(b) Respondent SCM and Kraftco are competitors in the sale of margarine, edible oils, and barbecue sauce.

(c) The elimination of competition with respect to the products cited in (b), above, by agreement between SCM and Kraftco would constitute a violation of the provisions of the antitrust laws.

(d) Richard C. Bond served on the Board of Directors of respondent SCM and Kraftco between 1967 and August 1, 1975.

4. This proceeding is not moot, and an order to cease and desist against SCM is both appropriate and necessary for the protection of the public interest.

Accordingly, the following order will issue:

ORDER

1. IT IS ORDERED that upon this order becoming final Respondent SCM Corporation and its successors and assigns, shall forthwith cease and desist from having, and in the future shall not have, on their board of directors any individual who either:

(a) serves at the same time as a director of Kraftco Corporation, its successors or assigns, or any other corporation which competes with SCM Corporation in the production or sale of any product or service; or

(b) fails to submit to SCM Corporation any statement required by Paragraph Two of this order.

2. IT IS FURTHER ORDERED that within thirty (30) days of the date of service of this order and prior to each election of directors or to the solicitation of proxies for such election, whichever is earlier, hereafter, SCM Corporation shall obtain a written statement from each member of its board of directors (except directors whose terms expire at the next election and who are not standing for re-election) and from each nominee for a directorship (who is not then a director) showing:

(a) the name and home mailing address of each director or nominee; and

(b) the name and principal office mailing address of, and a description of each product or service produced or sold by, each corporation which the director or nominee then serves as a director of, or at the time of the statement, has been nominated to serve.

Nothing in this Paragraph shall be construed to relieve Respondent of its obligation under Paragrapn 1(a) hereof due to any error or omission contained in any written statement received pursuant to this Paragraph.

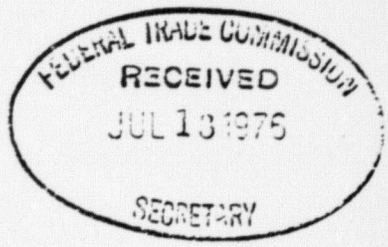
3. IT IS FURTHER ORDERED that within forty-five (45) days of the date of service of this order and annually for a period of ten (10) years thereafter, SCM Corporation shall file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order. Copies of the statements obtained pursuant to Paragraph Two of this order shall be submitted to the Commission as part of the reports of compliance required by this Paragraph. Nothing in this Paragraph shall relieve SCM Corporation of its obligation to comply with Paragraphs One, Two, and Four of this order once it is no longer required to submit reports of compliance to the Commission.

4. IT IS FURTHER ORDERED that SCM Corporation shall notify the Commission at least thirty (30) days prior to any change in the corporation such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

Morton Needelman
Morton Needelman
Administrative Law Judge

June 17, 1976

FTC - SCM Hearings



UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of KRAFTCO CORPORATION, a corporation,	:	
SCM CORPORATION, a corporation,	:	DOCKET NO. 9035
and	:	
RICHARD C. BOND, an individual.	:	

NOTICE OF INTENTION TO APPEAL

On June 17, 1976, the Hearing Examiner filed his initial decision in this proceeding and issued an order as against respondent SCM Corporation ("SCM"). Counsel for SCM was served with a copy of the initial decision on July 8, 1976.

Counsel for SCM hereby files notice of intention to appeal the initial decision to the Commission.

Respectfully submitted,

SULLIVAN & CROMWELL

By William F. Willi
(A Member of the Firm)

Marcia B. Paul

Attorneys for respondent
SCM Corporation
48 Wall Street
New York, New York 10005

Dated: July 12, 1976

A138

ENTERED

UNITED STATES OF AMERICA

BEFORE

FEDERAL TRADE COMMISSION

DOCKET NO. 9035

IN THE MATTER OF:

KRAFTCO CORPORATION, et al

ORDER

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Commissioners:

Calvin J. Collier, Chairman
Paul Rand Dixon
Elizabeth Hanford Dole
David A. Clanton

In the Matter of	Docket No. 9035
KRAFTCO CORPORATION, a corporation.	DECISION AND ORDER

The Federal Trade Commission having heretofore issued its complaint charging the respondent named in the caption hereto with violation of Section 8 of the Clayton Act and Section 5(a)(1) of the Federal Trade Commission Act, and the respondent having been served with a copy of the complaint and with a copy of the notice of contemplated relief accompanying said complaint; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint heretofore issued, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter issued an order withdrawing the matter described in the caption hereto from adjudication for the purpose of considering the proposed consent agreement pursuant to Section 3.25 of its Rules; and

The Commission, having considered the agreement and having provisionally accepted same, and the agreement containing a consent order having thereupon been placed on the public record for a period of sixty (60) days, and no comments having been filed, now in further conformity with the procedure prescribed in Section 3.25 of its

Rules, the Commission hereby issues its decision in disposition of the proceeding against the above named respondent, makes the following jurisdictional findings, and enters the following order:

1. Respondent, Kraftco Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office located at Kraftco Court, Glenview, Illinois.

2. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over the respondent, and the proceeding is in the public interest.

ORDER

I

IT IS ORDERED THAT Kraftco Corporation (identified in the complaint as "Kraftco, Inc."), a Delaware corporation, its successors and assigns, do forthwith cease and desist from permitting any individual to serve on its Board of Directors if such individual is or would be at the same time a director of SCM Corporation, so long as Kraftco and SCM Corporation compete in the production or sale of any product.

II

IT IS FURTHER ORDERED that within ninety (90) days of the date of service of this order and annually in each of the four (4) years thereafter, Kraftco shall transmit to each member of its Board of Directors (except directors whose terms expire at the next election and who are not standing for re-election), and each nominee for directorship who is not then a director, a list of the following products: (a) cheese, (b) fluid milk, (c) ice cream, (d) barbecue sauce, (e) edible oils, (f) margarine, and (g) any product in which Kraftco had sales which accounted for 5% or more of Kraftco's gross revenues in the preceding fiscal year. "Product" as used in category (g) of this Paragraph shall mean the four-digit industry code (SIC) classifications published by the Bureau of the Census in its latest Numerical List of Manufactured Products. Kraftco shall also request that each director or nominee certify to Kraftco in writing that he

or she does not serve on the Board of Directors of any corporation which is engaged in competition with Kraftco in the manufacture or sale in the United States of any product listed by Kraftco where the sales of such product by the corporation (exclusive of sales at retail to consumers) exceed $1,000,000 per year. The provisions of this Paragraph shall not apply where: (i) the other corporation on whose Board of Directors such nominee or director also serves controls 50 percent or more of the voting stock of Kraftco ("parent"); (ii) Kraftco controls, directly or indirectly through subsidiaries, 50 percent or more of the voting stock of the other corporation on whose Board of Directors such nominee or director also serves ("subsidiary"); or (iii) 50 percent or more of the voting stock of the other corporation on whose Board of Directors such nominee or director also serves is held by a corporation which also holds 50 percent or more of the voting stock of Kraftco ("sister"). "Corporation" as used herein shall include parent, subsidiary or sister corporations.

III

IT IS FURTHER ORDERED that for a period ending five (5) years from the date of service upon it of this order, Kraftco shall not permit on its Board of Directors any nominee or director who fails to submit a written certification pursuant to Paragraph II above, either because he or she cannot truthfully submit such written certification or for whatever other reason, or with respect to whom a reasonably diligent investigation by Kraftco would reveal that such certification cannot truthfully be made. The prohibition contained in this Paragraph shall not apply where (a) Kraftco, or any corporation on the Board of Directors of which a nominee or director of Kraftco also serves, cease to be competitors; or (b) said nominee or director ceases to serve on the Board of Directors of such other competitor corporation. Notwithstanding any other provision of this order, any director or nominee shall not be prohibited by this order from serving on the Board of Directors of Kraftco, if Kraftco has shown to the satisfaction of the Federal Trade Commission or to any other court of competent jurisdiction, in a final non-appealable determination, that there is no competition as defined in Section 8 of the Clayton Act and Section 5(a)(1) of the Federal Trade Commission Act between Kraftco and the other corporation on whose Board he or she serves in the manufacture or sale of any product required to be listed by Kraftco pursuant to Paragraph II of this order.

IV

IT IS FURTHER ORDERED that within ninety (90) days of the service of this order, and annually for each of the four years thereafter, Kraftco shall file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order. If compliance with this order requires any member of Kraftco's Board of Directors to resign or to be removed from the Board of Directors of Kraftco, or of another corporation, Kraftco shall be allowed a reasonable period of time, but in no event longer than ninety (90) days, within which to take any legal or other steps which are necessary to secure compliance with this order. Nothing in this order shall be construed to exempt Kraftco from complying with the antitrust laws or the Federal Trade Commission Act and the fact that any activity is not prohibited by this order shall not bar a challenge to it under such laws.

V

IT IS FURTHER ORDERED that Kraftco notify the Commission at least thirty (30) days prior to any change in Kraftco, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in Kraftco which may affect compliance obligations arising out of this order.

By the Commission. Commissioner Dole did not participate by reason of absence.

Chas. A. Tobin

S E A L

Charles A. Tobin,
Secretary

Issued: September 9, 1976

UNITED STATES OF AMERICA

BEFORE

FEDERAL TRADE COMMISSION

DOCKET NO. 9035

IN THE MATTER OF:

KRAFTCO, INC., et al

ORDER

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Calvin J. Collier, Chairman
Paul Rand Dixon
Elizabeth Hanford Dole
David A. Clanton

In the Matter of KRAFTCO CORPORATION, a corporation, SCM CORPORATION, a corporation, and RICHARD C. BOND, an individual.	DOCKET NO. 9035

FINAL ORDER

This matter having been heard by the Commission upon the appeal of respondent from the initial decision, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission, for the reasons stated in the accompanying Opinion having determined to deny the appeal:

IT IS ORDERED that the initial decision of the administrative law judge, pages 1-18, be adopted as the Findings of Fact and Conclusions of Law of the Commission.

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

IT IS FURTHER ORDERED that the following Order to Cease and Desist be, and it hereby is, entered:

ORDER

The following definitions shall apply in this order:

"Subsidiary" of SCM means any corporation, 50 percent or more of the voting stock of which is owned or controlled, directly or indirectly, by SCM.

"Parent" of SCM means any corporation which owns or controls, directly or indirectly, 50 percent or more of the voting stock of SCM.

"Sister" of SCM means any subsidiary of a parent of SCM.

1. IT IS ORDERED that respondent SCM Corporation and its successors and assigns shall forthwith cease and desist from having, and in the future shall not have, on their board of directors any individual who either:

(a) serves at the same time as a director of Kraftco Corporation, its successors or assigns (so long as Kraftco and SCM Corporation compete in the production or sale of any product or service), or serves at the same time as a director of any other corporation (other than a subsidiary, parent, or sister of SCM) which competes with SCM Corporation in the production or sale of any product or service; or

(b) fails to submit to SCM Corporation any statement required by Paragraph Two of this order to be obtained by SCM.

2. IT IS FURTHER ORDERED that within thirty (30) days of the effective date of this order, and prior to each election of directors or prior to the solicitation of proxies for such election, whichever is earlier, SCM Corporation shall obtain a written statement from each member of its board of directors (except directors whose terms expire at the next election and who are not standing for re-election) and from each nominee for a directorship (who is not then a director) showing:

(a) the name and home mailing address of each director or nominee; and

(b) the name and principal office mailing address of, and a listing of each product or service

produced or sold by, each corporation which the director or nominee then serves as a director, or has been nominated to serve as a director at the time of the statement.

The requirements of this Paragraph shall not apply to elections of directors occurring after five years from the effective date of this order, nor shall directors or nominees be required to list products or services of subsidiaries, sisters, or parents of SCM Corporation.

Nothing in this Paragraph shall be construed to relieve respondent of its obligation under Paragraph 1(a) hereto due to any error or omission contained in any written statement received pursuant to this Paragraph.

3. IT IS FURTHER ORDERED that within forty-five (45) days of the effective date of this order and annually for a period of ten (10) years thereafter, SCM Corporation shall file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order. Copies of the statements obtained pursuant to Paragraph Two of this order shall be submitted to the Commission as part of the reports of compliance required by this Paragraph during the first five (5) years. Nothing in this Paragraph shall relieve SCM Corporation of its obligation to comply with Paragraphs One and Four of this order once it is no longer required to submit reports of compliance to the Commission.

4. IT IS FURTHER ORDERED that SCM Corporation shall notify the Commission at least thirty (30) days prior to any change in the corporation such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

By direction of the Commission.

S E A L

John F. Dugan
Acting Secretary

Attachment:
Concurring Statement by
Chairman Collier

Issued: January 11, 1977

CONCURRING STATEMENT BY CHAIRMAN COLLIER

I concur in the Commission's Opinion, Findings of Fact, Conclusions of Law, and Order, except that I find it unnecessary to reach the question whether the director interlock in question violated Section 5 of the Federal Trade Commission Act. I conclude that a violation of Section 8 of the Clayton Act has been proven here, and that the order entered by the Commission is fully supported by that conclusion.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Calvin J. Collier, Chairman
Paul Rand Dixon
Elizabeth Hanford Dole
David A. Clanton

In the Matter of	
KRAFTCO CORPORATION, a corporation,	
SCM CORPORATION, a corporation,	DOCKET NO. 9035
and	
RICHARD C. BOND, an individual.	

OPINION OF THE COMMISSION

By Dixon, Commissioner:

Complaint in this matter was issued on June 17, 1975, charging Kraftco Corporation ("Kraftco"), SCM Corporation ("SCM") and an individual, Richard C. Bond ("Bond") with violating Section 8 of the Clayton Act (15 U.S.C. §19) and Section 5 of the Federal Trade Commission Act (15 U.S.C. §45) by virtue of Bond's simultaneous presence on the boards of directors of the two corporations.

The case was assigned for hearing to Administrative Law Judge ("ALJ") Morton Needelman. Subsequently the matter was withdrawn from adjudication with respect to Bond and

Kraftco, consent agreements with these parties were signed, and consent orders against them were issued on April 26 and May 6, 1976, respectively. The case against [illegible] was tried pursuant to a stipulated record, and [illegible] Needelman entered an initial decision sustaining the [illegible]laint and recommended entry of an order to cease and [illegible]st. The case is before us on respondent SCM's appeal from the ALJ's decision.

Initial Decision

It was not disputed, and Judge Needelman so found, that Bond served simultaneously on the Boards of Directors of SCM and Kraftco, that both corporations are engaged in commerce and have capital, surplus, and undivided profits aggregating more than $1,000,000, and that the two corporations competed with each other in the sale of margarine, edible oils, and barbecue sauce. (I.D. 3-8) 1/ Sales by SCM in fiscal 1975 of products sold in competition with Kraftco were roughly $83 million, while Kraftco's sales in the same category approximated $258 million. (I.D. 7)

The ALJ concluded that respondent had violated Section 8 of the Clayton Act and Section 5 of the FTC Act. The Judge further concluded that the need for an order to cease and desist was not rendered moot by Bond's voluntary resignation from SCM's Board or by any other circumstances, and that entry of an order corresponding to the "Notice of Contemplated Relief" initially served with the complaint was necessary to prevent recurrence of Section 8 violations and protect the public interest.

1/ The following abbreviations are used throughout this opinion:

I.D. - Initial Decision, Finding No.
I.D. p. - Initial Decision, Page No.

On appeal respondent argues that it has committed no violation of law; that if it has committed a violation there is nonetheless no necessity for the imposition of a remedial order; and that if there is a need for the imposition of a remedial order it should be no different from the consent order negotiated by co-respondent Kraftco.

Liability of Corporate Respondent
(a) Clayton Act, Section 8

Respondent does not question that a violation of Section 8 has occurred, but it contends that only an individual director may be held liable for such a violation.

Respondent places its principal reliance upon the language of the Section which states in relevant part that:

> "...no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce...if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination, or competition by agreement between them would constitute a violation of any of the provisions of the antitrust laws."

Respondent contends that Section 8, by its terms, merely forbids individuals to be joint directors; it does not render corporations liable to suit for the use of interlocking directorates. 2/

2/ Our own review of the legislative history reveals no sign that this question was directly addressed during the course of Congressional debate over the Clayton Act. Respondent cites a statement of Rep. Nelson, at p. 21 of its brief, which it argues implies that he understood Section 8 to cover only individuals. Whether this is a valid or relevant inference, the opposite inference can plausibly be drawn from other comments in the Congressional debates, like Representative Nelson's not directed to the precise issue here, which seem to treat Section 8 as though it imposed obligations on corporations. For example:

> "In drafting the provisions of Section 9 [now Section 8] your committee has endeavored to carry out the recommendations of the President. In order that the corporations affected may have ample time to readjust their boards of directors in keeping with the requirements of the act [a two year grace period is allowed]..." H.R. No. 627, H.R. 15656, p. 18, Part 1, 63 Cong., 2d Session (1914).

> "This section will be full of difficulty and peril for small corporations, and will affect them in far greater degree than it will large ones, against which the legislation is presumed to be aimed.

> "The use of interlocking directorates serves many useful purposes, and because in some instances it has been used to foster monopoly or create a restraint of trade, does not furnish a good reason why the use of interlocking directorates generally should be forbidden." Ibid., Part 2, p. 8.

On balance we think comments such as these, or those allegedly to the opposite effect cited by respondent, shed little light on the question here in issue.

While the language of Section 8 read in vacuo perhaps leaves some doubt as to the entities its proscription is intended to cover, the language of Section 11, [15 U.S.C. §21] which provides for enforcement of Section 8, leaves none. In relevant part Section 11 provides that the Commission shall, upon a finding that any "person" (defined in 15 U.S.C. §12 to include corporations) has violated Section 8,

> "...issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 7 and 8 of this Act, if any there be, in the manner and within the time fixed by said order...."
> [emphasis added]

Needless to say, only a corporation may "rid itself" of directors. SCM suggests that the underlined words are a vestigial remnant intended only to cover banks and the Federal Reserve Board, but there is nothing in the wording of the statute or in its legislative history to support this distinction. (I.D. p. 7) Rather, Section 11 by its plain terms empowers the Commission to remedy violations of Section 8 by entering an order to cease and desist against corporations, and this Section would be robbed of meaning by a construction that excluded corporations from the entities covered by Section 8. We believe, instead, that when Section 8 forbids the presence of a director on the boards of competing corporations, it

speaks both to the director and to the competing corporations, and all may be held accountable for ignoring its dictates.

Respondent correctly points out that the Supreme Court reserved judgment on this issue in a case in which it arose, United States v. W.T. Grant Co., 345 U.S. 629, 634n.9 (1953). However, at least one lower court has enjoined a corporation from Section 8 violations in a case brought to enforce that Section, United States v. Sears, Roebuck and Co., 111 F. Supp. 614 (S.D.N.Y. 1953), decree construed, 165 F. Supp. 356 (S.D.N.Y. 1958), a second court has recently asserted the same authority 3/, and the imposition of corporate liability is in accord with decades of Justice Department and Federal Trade Commission enforcement of the Clayton Act, via voluntary action, consent agreements, and litigation. To absolve corporations of liability for sharing directors with competitors would, without question, severely undermine enforcement of the law, since any corporation could maintain such an interlocking directorate and, if detected, simply replace the ousted director with another interlocking board member, again without fear that detection could lead to anything more than the director's resignation. Sanctions

---

3/ United States v. Crocker National Corp., No. C-75-2108, United States v. BankAmerica Corp., No. C-75-2109 (N.D. Cal., 8/27/76), [1976] 5 Trade Reg. Rep. (1976-2 CCH Trade Cases) ¶61,044. After noting that the corporate defendants in these interlock cases had argued that Section 8 applied only to individuals, Judge Peckham observed that:

> "[r]egardless of whether this contention is correct, it is clear, and the defendants conceded at oral argument, that were this court to decide that injunctive relief were appropriate in these cases, this court could, if it chose to, enjoin the defendant corporations, as well as the individual defendants from further violating Section 8. See e.g., 15 U.S.C. §25." (p. 69,673, footnotes omitted)

15 U.S.C. §25 is Section 15 of the Clayton Act (the Justice Department/Federal Court analog to Section 11), which empowers the district courts to "prevent and restrain violations of this Act."

against individuals alone are likely to be of limited effect, because there are hundreds of thousands of potential corporate directors at any given time. Sanctions against a much smaller number of corporations are far likelier to effectuate the purposes of Section 8, since an order against a corporation will prevent a far larger number of potential interlocks than one against an individual.

For the foregoing reasons we conclude that respondent's conduct violates the Clayton Act and may be proscribed by this Commission. We do not quarrel with respondent's proposition that the "plain meaning" of a statute may not be disregarded in order to effect its purpose. All that is "plain" in this instance, however, is that the Clayton Act authorizes the Commission to enter an order to remedy what respondent has done. Read in this light, we think Section 8 is properly construed to prohibit corporations as well as individuals from effecting interlocking directorates. The fact that this interpretation is most likely to effectuat the Congressional purpose is only a further reason to favor it.

(b) Federal Trade Commission Act, Section 5

We also conclude that respondent's conduct runs afoul of Section 5 of the Federal Trade Commission Act, which prohibits, inter alia, unfair methods of competition. It is well established that the prohibitions of Section 5 extend to practices which offend the underlying spirit and policy, as well as the letter, of the antitrust laws, FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239-244 (1972); FTC v. Brown Shoe, 384 U.S. 316 (1966); FTC v. Motion Picture Advertising Service Co., 344 U.S. 392 (1953). Assuming arguendo that illegally interlocked corporations must be allowed to escape liability through the allegedly porous wording of Section 8, no better illustration of a practice offensive to the spirit and policy of the antitrust laws if not their letter can be imagined than the employment and retention by a corporation of a director whose presence on the board itself violates the law. Application of Section 5 in such a case does no more than effectuate the clear purpose of the Clayton Act.

Section 5 has been similarly applied in an earlier case also arising under the Clayton Act. In Grand Union Co. v. FTC, 300 F. 2d 92 (2d Cir. 1962), the court sustained the

Commission's conclusion that Grand Union in its role as a buyer had violated Section 5 by knowingly soliciting and receiving payments made by suppliers in violation of Section 2(d), 15 U.S.C. §13(d). The court so found despite the fact that Section 2(d) did not expressly mention buyers. In rejecting the argument that the Commission had applied Section 5 to effect an unwarranted expansion of the Clayton Act the Court reasoned:

> "Nor can we accept the notion that the Commission is here legislating a 'new antitrust prohibition.' The practice itself is clearly proscribed...The Commission is not upsetting specific Congressional policies; the proceedings did not 'circumvent the essential criteria of illegality prescribed by the express prohibitions of the Clayton Act.' No economic activity, once lawful, has been suddenly brought within the prohibition of the antitrust laws. Jurisdiction, perhaps, has been expanded from...technical confines... but only fully to realize the basic policy of the... Act..." 300 F.2d at 98 (footnotes omitted).

Here, as well, the application of Section 5 does no more than permit the effectuation of a Congressional policy by applying that policy to the entities in the best position to ensure its success.

That Congress specifically contemplated the application of Section 5 to interlocking directorates is, moreover, suggested by some of the legislative history cited by complaint counsel. In explaining the language of Section 5, for example, the Senate Interstate Commerce Committee reported that:

> "The Committee was of the opinion that it would be better to put in a general provision condemning unfair competition than to attempt to define the numerous unfair practices, such as local price cutting, interlocking directorates, and holding companies intended to restrain substantial competition." [emphasis added] 4 /

For these reasons, then, we conclude that respondent's conduct runs afoul of Section 5 of the Federal Trade Commission Act.

---

4 / S. Rep. No. 597, 63rd Congress, 2d Sess. 13 (1914) See also the remarks of Senator Newlands, Chairman of the Committee, on the floor, 51 Cong. Rec. 11106, 11537, 12980 (1914).

Necessity for an Order

Respondent argues that even assuming it has been found to have violated the law, it should nevertheless not be ordered to desist from future violations, since it has halted the prior infraction and promises never to repeat it. 5/ The administrative law judge rejected this argument and we fully concur in his conclusion and in his reasoning, at I.D. pp. 12-16.

The violation which occurred here continued for several years and was terminated only when pointed out by the Commission. It was, moreover, not an insignificant, trivial, or technical infraction. In 1975, SCM and Kraftco competed with respect to more than $300 million worth of business, of which more than $80 million were sales by SCM. While these figures are only a small fraction of the total sales of the companies, $300 million or $80 million is by any measure a great deal of trade to be jeopardized by the sorts of anticompetitive agreements which interlocking directorates facilitate, and which Congress meant to stop before they got started when it imposed its ban on interlocks between competitors, cf. Sears, Roebuck, supra. 111 F. Supp. 614 at 621. If one regards the antitrust laws seriously, and we do, this was a serious violation.

It may be that respondent does not intend to utilize illegally interlocked directorates in the future. But it probably did not intend to use them when it hired Mr. Bond either. We cannot, however, resist the conclusion that SCM paid inadequate attention to whether it acted

---

5/ SCM promises never to rehire Bond so long as he directs Kraftco or any other corporation competing with SCM (Appeal Brief, p. 16). It does not promise to avoid other unlawful interlocks with Kraftco or anyone else.

permissibly or not, and there is nothing whatsoever in the record to suggest it will not continue to pay insufficient attention in retaining future directors unless ordered to do so. 6/

Under these circumstances we find nothing to challenge the ALJ's conclusion that an order is appropriate here. The W.T. Grant case, supra, cited by respondent held no more than that it was within the discretion of a trial court judge to withhold injunctive relief where a violation had been halted. The Court strongly suggested that it would not have quarreled with the imposition of injunctive relief in the same case, and obviously did not intend to disturb a long line of cases, prior and subsequent, holding that discontinuance of a violation is not proper grounds for omission of a Commission order, e.g., Fedders Co. v. FTC, 529 F.2d 1398 (2d Cir.), cert. denied, 45 U.S.L.W. 3244 (Oct. 5, 1976); Coro Inc. v. FTC, 338 F.2d 149, 153 (1st Cir. 1964), cert. denied, 380 U.S. 954 (1965); Clinton Watch Co. v. FTC, 291 F.2d 838, 841 (7th Cir. 1961), cert. denied, 368 U.S. 952 (196 ;

6/ SCM argues there is nothing which requires it to announce what steps it will take or has taken to avoid interlocks. (Appeal Brief, p. 18). We completely agree, and if those undisclosed procedures it uses to comply with the law had proven adequate to prevent this violation their identity would be no concern of ours. However, since a violation involving a large amount of commerce did occur and persist for several years, and since the record discloses nothing of the procedures used by respondent to prevent such occurrences, we are hard pressed to see what other conclusion can be reached than that SCM's procedures are inadequate to ensure nonrepetition of future violations.

Galter v. FTC, 186 F. 2d 810, 813 (7th Cir.), cert. denied, 342 U.S. 818 (1951); Eugene Dietzgen v. FTC, 142 F. 2d 321, 330 (7th Cir.), cert. denied, 323 U.S. 730 (1944). See also, United States v. Newmont Mining Corp., 34 F.R.D. 504, 505 (S.D.N.Y. 1964): "It is plain that mere resignation of a directorship allegedly held in violation of §8 of the Clayton Act does not render an action for violation of that Section moot. The Grant case expressly so holds."

Respondent's position here would necessitate that having shown a violation, complaint counsel then demonstrate by affirmative evidence the likelihood of future additional violations. To the contrary, we think the violation is itself the best evidence of the possibility of future such occurrences, and that the burden rests with respondent to demonstrate that violations will not recur before consideration may be given to omitting an order, United States v. W.T. Grant Co., supra at 633.

The Order

The administrative law judge entered an order corresponding generally to the provisions of the "Notice of Contemplated Relief" served upon the parties at the time the complaint was issued. Basically this order forbids SCM to violate Section 8 in the future (Par. 1), and establishes a mechanism for implementing and monitoring such compliance by requiring that future candidates for director provide a list of the products manufactured by companies which they already direct (Par. 2.) Copies of these reports shall be filed with the Commission periodically, for a period of 10 years, and SCM may not hire a director who has not provided the required report.

SCM argues generally that its order should be no broader than that consented to by Kraftco and directs particular objection to Paragraph 2, contending that the requirement that prospective directors list all products manufactured by companies of which they are presently directors may prove unduly burdensome in cases of companies which manufacture numerous products.

Having reviewed the order recommended by the ALJ, we believe it is a generally appropriate disposition of this matter, narrowly tailored to prevent recurrence of the type of infraction that gave rise to this proceeding, i.e., the use of an interlocking directorate violative of Section 8 of the Clayton Act and Section 5 of the FTC Act. We believe that Paragraph 2 is necessary, initially, to provide a ready means by which SCM may effect compliance by itself and its directors and prospective directors with Section 8, and also a means by which the Commission may check on SCM's compliance since it will review the product lists submitted by SCM directors. We have changed the necessity for "product description" to "product list" and as modified we do not believe this requirement should be unnecessarily burdensome. We believe that even large corporations have readily available a list or lists of the products they manufacture. However, we believe there is no necessity that this requirement exist in perpetuity, and we shall instead limit its duration to a period of five years. During this time it will provide a mechanism for SCM to comply with the law and for the Commission to monitor its compliance. Thereafter, SCM will

remain under obligation to adhere to Section 8, but it will be at liberty to adopt alternative methods by which to do so, as its experience dictates.

We have also modified Paragraph 1(a) to make clear that its prohibition on interlocks with Kraftco Corporation applies only while SCM and Kraftco are competitors. In addition we have modified the class of competitors with which SCM may not interlock to exclude any "subsidiaries", "sisters", or "parents" as defined in the order, and amended the reporting requirement accordingly. In all other respects we have retained the order recommended by the administrative law judge, and conclude that it is in the public interest that such an order be entered.

Respondent argues, as noted above, that if an order must be entered it should be no different, or at least no more stringent, than the consent order to which co-respondent Kraftco earlier agreed. Any more comprehensive order, protests respondent, would be discriminatory and tantamount to punishing it for having exercised its constitutional right to contest the charges against it. 7/ SCM seeks to bolster its argument with the following syllogism: In accepting a consent order the Commission certifies that it is in the public interest; a litigated order must similarly be in the public interest; therefore the Kraftco consent order is a sufficient disposition of this proceeding and anything in excess of its provisions must amount to punishing SCM for litigating.

7/ Respondent also makes certain other charges of discrimination which are patently frivolous. It cites the Commission's past practice of forebearing to obtain an order where the interlock was dissolved. But it does not deny that this enforcement strategy was modified well in advance of the instant matter, since which time the Commission has sought cease and desist orders from many alleged Section 8 violators. (I.D. p. 11) Respondent also argues that it was discriminated against by being sued without being previously notified of the charges against it. Assuming arguendo that this was the case (there is some dispute as to whether it was, I.D. pp. 11-12) we can apprehend no prejudice since respondent was subsequently given an opportunity to negotiate a consent settlement but evinced no apparent interest (I.D. p. 12, n. 21).

An unstated premise of this argument is, of course, that Kraftco, the consent settlor, may be assumed to have violated the law in equal measure as SCM, and that the remedy appropriate to Kraftco may somehow be the test of that appropriate to SCM. In fact, of course, Kraftco in settling admitted no legal liability, and gave up its opportunity to defend the charges against it and to present any evidence which might tend to mitigate the force of incriminating evidence. In light of this it is somewhat presumptuous for this Commission or SCM to assume that Kraftco's order provides an absolute measure of what would satisfy the public interest with respect to SCM.

However, assuming arguendo that it is at all relevant to compare the treatment of a party which has not admitted liability and that accorded a party adjudged in violation, we nonetheless find no impropriety in the mere imposition of varying orders upon settlors and non-settlors in the same case.

The "public interest" on behalf of which this Commission is enjoined to act comprehends not only the justness with which particular disputes are resolved, but the speed and efficiency with which resolutions are obtained as well. The public unquestionably has a strong interest in the ability of its law enforcement institutions to resolve controversies swiftly and at minimum cost. Every party accused of wrongdoing in our system has the right to insist that the government prove the charges against it, but if every accused were to exercise that right to its fullest extent the administration of justice would be seriously retarded if not actually imperiled. As a result, we believe the Commission does not act improperly when, in considering acceptance of a proferred consent order, it weighs as part of the requisite public interest the savings in time, money, and uncertainty which the settlement will provide.

It follows from this that the terms of a consent settlement may, consistently with the public interest, be less stringent than the corresponding order obtained through litigation, and conversely, that an order entered after litigation may properly be more stringent than an order entered after settlement.

Moreover, SCM does not suggest, nor could it, that the order entered here will disadvantage it in competing with Kraftco, or with any other company. Nor does the order do more than prevent the recurrence of violations of law previously engaged in. This being the case, we cannot conclude that the order is punitive merely because it is broader in some respects than an order entered after negotiations with a party charged with but not formally adjudged to have committed the same offense.

An appropriate order is appended.

January 11, 1977

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SCM CORPORATION,	:	
Petitioner,	:	
v.	:	PETITION FOR REVIEW
FEDERAL TRADE COMMISSION,	:	No. 77-4077
Respondent.	:	

SCM Corporation hereby petitions the Court to review and set aside the Final Order of the Federal Trade Commission, issued January 11, 1977, in the Matter of Kraftco Corporation, et al., Docket No. 9035.

Dated: New York, New York
March 24, 1977

SULLIVAN & CROMWELL

By William E. Willis
(William E. Willis)
48 Wall Street
New York, New York 10005
212-952-8100
Attorneys for Petitioner
SCM Corporation

Richard Sexton
Milton Wolson
299 Park Avenue
New York, New York 10017
Of Counsel

Certificate of Service

I, William E. Willis, hereby certify that on March 24, 1977, I mailed a copy of the foregoing petition to Federal Trade Commission, Washington, D. C. 20580.

William E. Willis

SCM: Richard C Bond

OFFICIAL TRANSCRIPT OF PROCEEDINGS

BEFORE THE

Federal Trade Commission

DOCKET NO. 9035

In the Matter of:

KRAFTCO, INC.,
a corporation.

SCM CORPORATION,
a corporation.

RICHARD C. BOND
an individual

Place Washington, D. C.

Date December 19, 1975

Pages 1 thru 74

Alderson Reporting Company, Inc.

Official Reporters

300 Seventh St., S. W. Washington, D. C.

NA 8-2345

A167

C O N T E N T S

NONE

E X H I B I T S

NONE

- - - - -

ROSE

NO XIBITS

WITNESSES.

BEFORE THE

FEDERAL TRADE COMMISSION

IN THE MATTER	
of	
KRAFTCO, INC., a corporation.	
SCM CORPORATION, a corporation.	DOCKET NO. 9035
and	
RICHARD C. BOND, an individual.	

Room 7312, The 1101 Building
414 Eleventh Street, N. W.
Washington, D. C.

Friday, December 19, 1975

Met, pursuant to notice, at 10:20 a.m.

BEFORE:

MORTON NEEDELMAN, Administrative Law Judge.

APPEARANCES:

WILLIAM E. WILLIS and MARCIA B. PAUL, Sullivan and Cromwell, 48 Wall Street, New York, New York, Attorneys for SCM Corporation.

C. LEE COOK, Chadwell, Kayser, Ruggles, McGee and Hastings, 135 So. LaSalle, Chicago, Illinois, 60603, Attorneys for Kraftco, Inc.

CLINT BATTERTON, RONALD BLOCH and JOSEPH TASKER, Attorneys for the Federal Trade Commission.

- - -

P R O C E E D I N G S

JUDGE FEDDELMAN: On the record, please.

This is the first prehearing conference in Docket No. 9133, Kraftco, Inc., et al.

In my prehearing order number 1, I set an agenda for this prehearing conference which was subsequently amplified.

I think the first thing we should discuss is the addition proposed by counsel for Kraftco Corporation respecting the possibility of a settlement. I am willing to go off the record if it is the desire of the parties that the record not reflect any discussion about settlement.

MR. COOK: Well, Your Honor, this morning Mr. Bloch and I reached agreement of principal among counsel to settle the matter.

It is subject to the approval of the Kraftco Board which will not meet until January 8th and so while he, at this point, is unwilling to request that the matter be withdrawn from adjudication until we have received the approval of the Board, we have, among ourselves, reached agreement in principal to dispose of the case so I see so I see no need to discuss the substance of the settlement at this time.

MR. BLOCH: Your Honor, Mr. Cook has stated the situation correctly. I just want to state for the record at this point that because we have no assurance that the Kraftco

Board will approve the settlement which we have reached, we are not prepared to withdraw our motion for summary judgment at this time.

However, assuming that the Krafteo Board does approve the settlement, at such time as the executed agreement comes back to us, we will withdraw our motion and move to withdraw the matter from adjudication at that time.

JUDGE NEEDELMAN: What is the time schedule that you contemplate with respect to Kraftco?

MR. BLOCH: Assuming that the Board meets on the 8th -- is it, Lee?

MR. COOK: Seventh or 8th.

MR. BLOCH: The 7th or 8th of January and approves it, I would imagine that within a couple of days thereafter, we would have the executed agreement in hand so that certainly, by the 15th of January at the very latest, we would have in your hands a motion to withdraw or a motion for summary judgment to withdraw the Kraftco matter from adjudication.

JUDGE NEEDELMAN: All right. Just proceed on that basis. I don't like to have extended discussions of settlement on the record. Let's just proceed.

That time schedule sounds perfectly adequate to me. We will just proceed on that basis. Where does ICM stand? Do you want to go off the record?

If there is going to be any discussion of settlement, some counsel prefer that this not be on the record. It is up to you.

MR. WILLIS: Your Honor, we made no request with respect to settlement. We have pending before Your Honor a motion to dismiss the matter under the summary decision rule and so far as we are concerned, we would believe that the matter should be heard today. And we hope that Your Honor will be receptive to our argument.

JUDGE NEEDELMAN: All right. Just proceed on that basis.

MR. WILLIS: Shall I go forward with that motion, Your Honor?

JUDGE NEEDELMAN: Yes, sir. Proceed.

MR. WILLIS: If Your Honor please, this is really the first opportunity that SCM Corporation has had for an independent and objective look at the facts in this case; at least, those facts which are undisputed and on the basis of those facts, for an independent and detached appraisal of what the public interest really requires in this situation.

The complaint counsel have very zealously pursued this case. They have, I submit, somewhat lost sight of what is really involved and what the Congress had in mind in enacting legislation such as the Clayton Act.

The complaint counsel have drafted and filed the

complaint seeking the removal of a Director from the Board of one of either SCM or Kraftco immediately. That Director voluntarily resigned.

In a sense, there was complete victory so far as the complaint counsel is concerned at that moment in time.

The public interest which Congress had expressed in the statute had been fully satisfied. I might add parenthetically that it was done at extraordinary expense.

As Commissioner Thompson noted in his decision, or when this complaint was filed, that he would prefer taking the matter up with the corporation and the individual involved informally, and he may be able to accomplish this same result without a mass of talent which is here in this room at the expense to the Commission generally.

But nevertheless, whatever the case, what the Commission wanted, whether it was entitled to it or not, they obtained.

Yet in spite of that, complaint counsel have not been satisfied. To them, once they have found an interlock of any size of shape or form, there must be a perpetual injunction against the corporations involved.

They are not willing to take into account the fact that there has been no prior history of any kind of Section 8 problems either with my client, SCM, or with Kraftco or with the individual involved.

They are indifferent to the fact that the so-called "overlap of product" is very small compared to the size of these two companies. They are tiny products for SCM and tiny products for Kraftco.

They don't accept the assurance which SCM has given that so long as Mr. Bond is on the Board of Kraftco, he will never be reelected to the Board of SCM. To the complaint counsel, it is all very automatic. It is like a computer, and there is no need for Your Honor to apply the discretion which is vested in the Commission.

There is need to look at the surrounding facts, to compare this case with the facts in a case of a similar character en masse, and how they have been dealt with.

To them, once there is an interlock, then you must blindly go down the path towards an injunction. But what we are here asking Your Honor is to apply that administrative discretion to the facts of this case.

JUDGE NEEDELMAN: Let me just interrupt you one minute, counsel. You sort of neatly slip from the Commission's discretion to the Administrative Law Judge's discretion.

Aren't all of the matters that you have discussed policy decision discretions which lie solely with the Commission rather than the Administrative Law Judge?

MR. WILLIS: I agree with Your Honor. The

ultimate source of the exercise of the discretion, of course, is within the Commission, but the Commission, I think, would want your judgment on this matter initially.

They would want Your Honor to come to some conclusion as to what you think public interest requires, and what we are here today is asking Your Honor to agree with us that the public interest is fully satisfied now, and that no order is necessary. Of course, the Commission's decision will control.

JUDGE NEEDELMAN: The reason I raise this is: Let's assume that BCM is the first company that has been selected out for this tough enforcement view which Mr. Bloch and his colleagues have.

Doesn't that represent a policy determination in the first instance by the staff of the Federal Trade Commission and one which is acquiesced in by the Federal Trade Commission?

By that, I mean, let's assume that before this particular case was brought, the Commission was willing to accept the voluntary resignation of the Board member as dispositive of all issues in the case.

Let's further assume that this has been a Commission policy, let's say, for ten years, but the Commission notices that interlocks continue and then for policy reasons, it decides that we no longer rely solely on the voluntary

resignation of a Board member.

We require, now, a cease and desist order which operates in perpetuity. I am not suggesting that that is the policy line which the Commission followed, but how am I, as an Administrative Law Judge, really to probe a policy decision which the Commission made and even if I could probe, it is rarely any of my business to second-guess the policy determination that the Commission may have made.

MR. WILLIS: That certainly is not your function or my function, to second-guess the policy of the Commission, but I don't believe that the complaint or the Commission's decision to issue a complaint was a decision with respect to what ought to be done in this case.

I mean, I think what the Commission has done, on the basis of what staff has, the information they gave to them if ever they said that "We will issue the complaint, and we are going to ask the Administrative Law Judge to tell us what he thinks ought to be done about this complaint."

JUDGE NEEDELMAN: Surely, on the facts.

MR. WILLIS: On the facts.

JUDGE NEEDELMAN: But not on the matters which go to the Commission's discretion. Namely, how vigorously they should enforce Section 8; how the Commission should enforce Section 8, whether they should consider Section 8 a dead letter.

Certainly, you know, it doesn't take too much for me to say, you know, if I were of that mind. I could say well, you know, Section 8 was passed in a period of, say, Wilsonian exuberance, and despite Justice Douglas's vigorous dissent in the W. T. Grant case, argument can be made that today, Board Directors really don't perform any policy function or, as a matter of fact, they are just figureheads.

It is management language. It is the management of the company which really controls things, and Section 8 is all wet.

Now, is that within my discretion to say that?

MR. WILLIS: No, of course not. And that is not what we are here asking you to do. We are asking you to say to the Commisison in your initial decision that since the complaint in this matter was filed, there was an immediate resignation of the Director involved and, of course, that is what Section 8 was directed at.

In addition, there is no evidence that either of these companies has ever had a Section 8 problem before. There is no evidence before me that there has been any anti-competitive harm as a result.

From this, I don't see any price fixing. I haven't seen any evidence of any market allocation of any kind.

JUDGE MEDELMAN: Do I reach that point at all? The way I read the decisions, as I read the statute, there is

no necessity that I show price fixing.

The way I read the statutes and the cases, if the companies are in businesses which, to some extent, beyond the de minimus extent discussed in the Sears Roebuck and Baldwin Montrose case that the fact that they could enter into an arrangement which would be a per se violation of the Sherman Act, the Section 5 of the Federal Trade Commission Act is adequate, and that there is no necessity in Section 8 that you prove that there was actual price fixing or actual market allocation.

MR. WILLIS: No, I am not suggesting that, Your Honor. What I am talking about is not with respect to the merits of the Commission's case.

I mean, for the purpose of my argument, we just assume that there has been a prima facie violation of Section 8 made.

I think what we are saying to Your Honor is let's look at the facts which are undisputed and among them is the fact that he immediately resigned; the fact that there was no evidence that anything actually happened that has hurt the public; the fact that each of the products that are involved were a very small part of the business of both companies; the fact that SCM has given assurance; the fact that unlike a great bulk of the cases over the past, no prior request was made by the agency for resignation.

In all of these facts put together, what we are asking is that Your Honor say to the Commission that we have obtained the resignation of the Director involved, and that it is my recommendation that no further adjudicatory proceedings are necessary in the circumstances of this case.

JUDGE NEEDELMAN: Aren't there special circumstances in this particular case which may dictate with respect to relief that may not be appropriate for another case? Namely, that based upon your own description of the business of SCM, it sounds to me like a company which is diversifying into many fields which are quite apart from its traditional fields and that unless it is under an order, there is always the danger that it will select Board members who may have an interlocking relationship with a competitor, that it is very hard, in this kind of situation, to really predict the businesses that SCM will eventually go into.

It is best to put them under an order that makes sure that they don't. Well, that they take special care to avoid el[illegible] directors. Will this do, have this interloc[illegible] relationship?

MR. WILLIS: I don't think that is what the Supreme Court had in mind when they said that there had to be a showing recognizing a recurring relationship.

We have, however, got a company such as SCM which

is certainly, in some respects, diversified and has been. This is a special problem. The company has to be alert to these problems.

On the other hand, you have got to appreciate that this is the only such situation that has come to light. We are not talking about the kinds of direct flagrant violations that many of the prior cases have been involved with where no relief was required, no prospective relief was required.

What we are saying, Your Honor, is that since this violation has been immediately and promptly ended, that there has to be some evidence that we are, that SCM is indifferent to this, that it is indifferent to its responsibilities, and that there has been no showing of that here but even more importantly, so far as the kind of violation that we are talking about here is concerned, it is very different from the kind of violation that I guess 95 per cent of the cases that come before Your Honor have.

This is not a case where the Commission is seeking to stop some practice which has injured the public like price fixing or misrepresentation, false advertising, discriminatory allowances.

There are many kinds of cases that come before the Commission. This is a structure case. This is a case where Congress has said that regardless of whether or not there is

any adverse impact, we don't like one man serving on the Board of two big companies that are competitors so that we just want to bar that kind of structure.

Well, that problem has been removed here, and we are not suggesting that accepting our argument here means that the Commission suddenly goes out of business because of a caught wrongdoer who says: "Well, I will stop the wrong done and, therefore, I am not subject to an order."

I don't think that Your Honor has to concern himself with that mass of cases that come day in and day out before the Commission because we are talking about a different kind of situation here which is the reason that there has been such a mass of cases over the past years where the Commission and the Department of Justice have accepted voluntary resignations without even bringing a lawsuit.

JUDGE NEEDELMAN: Hasn't the Department of Justice changed that practice?

MR. WILLIS: They have brought cases. That is one. There is one that they brought recently on the West Coast. I don't know the background, whether these people refused to resign or not.

It was, of course, a somewhat new theory; their extending the scope of Section 8 into theories that are somewhat different from the past, but what we are saying is, Your Honor, that there has to be the application of the

Commission's discretion, and it ought to start with Your Honor.

Now, as Your Honor properly noted, the ultimate decision has to be made by the Commission as to what has to be done, but we think that the undisputed facts on our motion for summary decision should lead Your Honor to the conclusion that no relief of a prospective nature is necessary under the circumstances of this case.

But let me go very briefly into the argument about the jurisdiction or the power of the Commission under Section 8 with respect to corporations.

Even apart from the considerations that I have set forth, there is an additional legal obstacle to the relief such as the one complaint counsel is seeking here, and that is that the language of Section 8 is, of itself, directed at the individual, not at the corporations, and we all know Justice Black used to, on constitutional issues, pull out the Constitution and say: "We just have to apply it the way it reads."

And that is what we are asking here with respect to Section 8, that Section 8 be applied as it reads, and it makes sense because here the nexus of the wrong under a Section 8 claim is that an individual, I mean SCM alone didn't do anything wrong. He and Krafft did not do anything wrong.

It is his relationship with two competitors, and the full Congressional purpose is achieved, that purpose is achieved by that Director either resigning or being forced to resign from one of the conflicting Boards.

And as we know, this is no frivolous argument. The Supreme Court went out of its way in the W. T. Grant case to say that it was not passing on that specific point.

Now complaint counsel say: "Well, the answer to this is found in Section 11 and that, of course, as Your Honor knows, is the procedural section.

It does not purport to make the substantive law, and as we have noted in our brief by looking and tracing the language of the statute from 1914, it would appear that that language was in there because at one time, the bank interlock problem was what was there.

But apart from that, again, looking at the language of that statute, if that is what they are relying upon, Section 11 says no more than that the corporation should rid itself of the Directors chosen contrary to the provisions of Section 7 and 8 if need there be.

Now, if that is the basis of their jurisdiction here, it would seem to me obvious that there are no Directors on the Board to be rid of. And there is certainly nothing in Section 11 that talks about broad prospective relief going into the future.

But furthermore, the complaint counsel said: "Well, look to Section 5." Now, Section 5, of course as Your Honor knows, is a basis for a great part of the Commission's jurisdiction, but I don't know of any case where the Commission or the courts have interpreted Section 5 to change the express will of Congress with respect to a structural kind of violation such as Section 8.

But Congress has said that this is what is illegal under Section 8. I don't know that the Commission has ever said: "Well, we will use Section 5 to change the express language of a Congressional statute."

JUDGE NEEDELMAN: Section 5 has been used in merger cases.

MR. WILLIS: Certainly. But, Your Honor, I don't know of any merger case where Section 5 has been used to change the language, to change the express content, the express language of Section 7, for example.

JUDGE NEEDELMAN: For example, the Commission may sue a Section 7 case, the noncorporate partnership or individual and bring the case under Section 5.

MR. WILLIS: Well, of course, if that, then it really isn't a Section 7 case. It is a case where there is an unfair method of competition.

I have got two companies doing something together, whether it is merging, conspiracy or whatever, which has had

an impact or is about to have an impact upon the public.

Here, in Section 8, we are not talking about, as Your Honor noted earlier, we are not talking about something that has affected the public.

We are talking about a situation where the mere existence of something might very well, in the future, be misused to do something wrong. Therefore, I don't think that Section 5, which is directed to unfair methods of competition, is applicable here because I don't think there has been any such impact or injury shown.

Your Honor, I think we have set forth in our papers the arguments and points on our motion for summary decision, and it is summary.

In conclusion, I would just like to sum up, and here we are again asking for the exercise of the Commission's discretion, that in view of the fact that there may be no power to issue an order against the corporation anyway, in view of the fact that the public interest has been fully served by what has already happened here voluntarily, the fact that there is nothing before Your Honor to show there is any danger that SCM will run out and get into some interlock in the future, that the power of the U. S. Government is not further needed in the circumstances that are before Your Honor here today.

JUDGE WHEDELMAN: How is your client, by the way,

the entry in this case, in terms of its future conduct?

It seems to me that order will operate respectively if a Board member is selected. Why is your client resisting so much? I am just curious about this.

MR. WILLIS: Of course, there is argument that complaint counsel always made on these cases and, of course, those situations where consent orders have been entered. I am sure that was the philosophy: we send it; let's pay the $2; but there has to be a time, Your Honor, when corporations or individuals or whatever stand up and say to that Government: "I am not subject to this kind of order.

Certainly, I am not going to go out of business if an order is entered against me. Certainly, I am not going to lose any sales in the future. I am not going to be subject to damages of any kind, but there has to be a time when you think that the Government ought to be told that.

"Let's look at the facts here, Government; what you have, and what has been done. Why have a perpetual injunction against me where I have to give reports annually?"

JUDGE NEEDELMAN: That is not the burden of my question. I am sorry. You misunderstood my question. It was my fault. What I am trying to get at is, again, just in terms of relief.

Considering the relief which the Government proposes

here, is there any special business consideration which is argued against that relief? Put aside all the arguments you may want to make about overreaching Government. I am just talking in terms of the kind of arguments which are usually made in the FTC in certain relief situations. Say relief, reasonable relief goes to impact. And in our business, is a certain way. Is that present here in any way?

MR. WILLIS: Well, so far as we are concerned, the relief that the Government is entitled to, they have got. I mean, they have gotten the resignation. We have lost a Director.

JUDGE NEEDELMAN: How does the relief impact on your business, or does it impact on your business?

MR. WILLIS: As I said, I cannot point out that we would lose sales, or we would lose business. What I am saying is that when you put a company under a reporting restriction, when it has got to circulate its Directors each year, this is a burden which they feel, under the law, is not appropriate in this case, and even though it is expensive and it is time consuming, they are subjecting themselves to the publicity.

As to this, SCM felt that it ought to get this matter before Your Honor and before the Commission and get somebody to focus: Is the public interest really required here? Is it required under the public interest that this

matter proceed further? And the fact that I can't show that there is a reasonable order would be impact to our financial detriment.

I don't think it ought to be a controlling factor here. What I would like to see, and I think that this would make sense from both the FTC enforcement policies and the Antitrust Division's enforcement policies, is that there be, as a rule of procedure, something that has been worked out informally and in practice, and that is that where a Governmental agency sees a potential interlock or a problem, that with a simple letter say: "We notice Joe Jones is on the Board of those two companies. This looks like a violation. Will you resign?"

My guess is that 100 per cent of those Directors would resign immediately. No Director wants to go through this, and no corporation wants to go through it.

That would really, I think, serve the public interest, that kind of policy, and I think that theory ought to start with a decision, I think, of a Judge such as Your Honor, but that would have various public interest advantages.

Number one: It ends the potential interlock immediately without further controversy.

JUDGE NEEDELMAN: My difficulty with that, Mr. Willis, is that even if I agree with you, it seems to me

that you are assigning to the Administrative Law Judge a function of the Commission's Policy Planning Office and frankly, I couldn't care less of how the Commission allocates its resources. It is simply none of my business.

It may allocate its resources as foolishly as it wants to. That should not, simply, be my function, to second-guess the Commission on the cases it brings any more than it is the function of the District Court Judge to tell the Justice Department that it doesn't think it has brought, and has used its resources wisely in suing the manufacturers of toilet seats, if you will, which is a recent Justice Department case.

Some Judges may think that that is a perfectly horrendous allocation of resources, but I don't see much where he considers that to be an issue in the case.

I mean, there are plenty of people at the Federal Trade Commission who get well paid to run their computers and figure out how to allocate their resources. I am not one of them, and I am deeply troubled by the whole burden of your argument in almost shifting to me this, in the sense that it would almost shift to me this review of the Commission's policy-making function in terms of how it picks its cases, and how it allocates its resources apart from the merits of a particular case.

That, of course, is my job, for me to review the

facts and the merits of a particular case and put that alongside the applicable statute and reach what I hope is a reasonable and fair decision.

But for me to go back and decide what did the FTC have in mind here, why did they send out these letters, why don't they just pick up the phone and call these corporations, I haven't the vaguest idea why that is their policy and frankly, I don't really care.

MR. WILLIS: I am not asking Your Honor to settle policy. I am saying to Your Honor that the facts here justify the relief we are seeking, and what I am attempting to say is that the relief I am seeking is consistent with the public interest which I think is part of Your Honor's responsibility.

JUDGE NEEDELMAN: That part alone, I certainly find that part of your argument interesting. I will look at that very carefully, the argument that the statute has been accomplished.

It seems to me that that is an argument which is proper for me but behind that, for me to start worrying about how the FTC selects its cases, I just simply can't.

MR. WILLIS: I am not suggesting that that is the function of the Judge. The Judge has to decide the cases as they come before him. What I am saying, though, as a rule of law, it can very well be articulated in this very case based

upon the prior handling of cases of that nature, based upon the facts of this case which would say, simply, number one, that where there has been a voluntary resignation by the Director immediately after first being advised of the problem, where there is no evidence before me with respect to the facts that there could be a danger of a recurrence of this fact, that certainly, it has not been decided that corporations are subject to Section 8.

Anyway, all of those factors form the basis of these facts and these principles of law. I recommend to the Commission that no further proceedings be had in this matter and I think that can be buttressed, that conclusion, by showing that it is fully consistent with the Congressional intent and with what is the public interest on the facts of this case.

JUDGE NEEDELMAN: All right, sir. Thank you very much.

Mr. Batterton.

MR. BATTERTON: Your Honor, I would like to start with Mr. Willis's argument and then, if I may, I would like to proceed with the complaint counsel's case.

JUDGE NEEDELMAN: I would like you to start somewhere else. I would like for you to start with the argument that neither party has made in the W. T. Grant case.

The W. T. Grant case seems to indicate that there

is a pleading problem here. The court said that the complaint alleged threatened violations other than those specifically charged.

These are circumstances that the District Judge could decide if there was no significant threat of future violation, and that there was no factual dispute about the existence of such a threat.

Now, my question to us is this: Given this language, the Supreme Court's opinion of W. T. Grant, don't you have a defective complaint in this case?

MR. BAMBERTON: No, Your Honor, we do not because we are proceeding. This is the Federal Trade Commission proceeding. This is not a Department of Justice action.

Section 11 specifically provides that once the Federal Trade Commission finds a violation has occurred, it shall issue an order to cease and desist.

JUDGE NEEDELMAN: That is not my question to you. My question to you goes to the very simple point, namely, in that in the W. T. Grant case, at least one of the reasons why the Court did not reverse the trial court was that the complaint did not allege there was any danger of recurrence.

And the way I read your complaint, you do not have any allegation of any danger of recurrence. Don't you have a defective complaint under W. T. Grant? That is my question to you.

MR. BATTERTON: Well, Your Honor, the Justice Department is only after joint future violations.

Under Section 5, the Federal Trade Commission, because of Section 11 in the Clayton Act, is specifically required to issue an order of cease and desist once it finds a violation has occurred.

JUDGE NEEDELMAN: What is the difference?

MR. BATTERTON: We are dealing with different standards.

JUDGE NEEDELMAN: I am confused. The Justice Department, in the W. T. Grant case, wasn't there a decree in the District Court which is similar to a cease and desist order?

It was a civil case, wasn't it?

MR. BATTERTON: The Justice Department is not operating under the same standards of the Clayton Act that the Federal Trade Commission operates.

Furthermore, this action is brought under Section 5, and both Section 5 and Section 11 shall enter an order for cease and desist once it finds a violation.

JUDGE NEEDELMAN: Fine. I am arguing with the rights of the Federal Trade Commission to enter an order.

MR. BATTERTON: That is why W. T. Grant is distinguishable in that particular regard because the Justice Department is proceeding under different standards.

The Justice Department has to enjoin further violations. Therefore, it is arguable that the Justice Department has to show that there is threat of future violation.

The Federal Trade Commission, on the other hand, is required to issue an order to cease and desist once a violation is found.

JUDGE NEEDELMAN: Well, an order can simply say that you, Mr. Bond, resign. You, Kraftco, make sure he resigns and you, SCM, you, too, make sure that he resigns period.

What I am saying to them, frankly, is that it surprises me that the staff of the FTC could draft that complaint the way they did given the clear language of the W. T. Grant case.

This is not the proper way to draft a Section 8 complaint.

MR. BATTERTON: Well, Your Honor, I can simply say that the Federal Trade Commission has drafted similar, if not practically identical, complaints.

JUDGE NEEDELMAN: I don't care about this. I don't care what the Federal Trade Commission has drafted or not drafted.

There is one case. I would read the one Supreme Court case in Section 8, the W. T. Grant case, that case involving this very issue on how to draft a Section 8

complaint.

I assume everyone at FTC reads that, and I wonder why they ignored that.

MR. BATTERTON: I would like to point out that in the W. T. Grant case, the Supreme Court, had they been at trial court, they might have issued an injunction which would indicate that they did find that complaint fatally defective, that it would not have been possible for t District Court to issue an injunction against W. T. Grant.

JUDGE NEEDELMAN: That is not your argument. That is not material one way or the other. We have it anything more to say on this in reply. Do you want to answer my question?

My question is: Given the language in the W. T. Grant case, why didn't you draft the complaint as the court indicated it should be drafted in the W. T. Grant case?

MR. BATTERTON: It appears to us that in the W. T. Grant case, the Supreme Court did not consider that a fatal flaw in the complaint. It is not a dispositive issue.

JUDGE NEEDELMAN: Fatal flaw. They didn't hold against W. T. Grant. They threw the case out. I understand your argument about a flaw.

The Supreme Court decision was proper, pretty fatal, I am sure, as far as the Justice Department is concerned.

MR. BATTERTON: They only held within the discre-

tion.

JUDGE NEEDELMAN: Within the discretion which is the District Court. That is correct. Given the complaint that the District Court had.

MR. BATTERTON: Then at most, Your Honor, what you are saying is that it would be within your discretion, under W. T. Grant, to dismiss this particular action because of the way this complaint is framed.

JUDGE NEEDELMAN: Actually, I am more curious than anything else. Why, when you have a Supreme Court opinion which tells you how to draft an opinion, the staff of FTC chooses to ignore it. All right. Proceed. Go ahead.

MR. BATTERTON: Turning to the argument SCM has presented, Your Honor, basically, SCM is arguing in this particular instance that because of the particular circumstances of this case, they are entitled to dismissal as a matter of right.

The primary flaw with that position is that it is not the policy of the Federal Trade Commission to dismiss such actions after the Director resigns.

In the last three years, the Federal Trade Commission has entered consent decrees in eleven different matters in which, as a matter of fact, the Director resigned after the filing of Part 2 complaints.

The Federal Trade Commission proceeded to enter

consent decrees on all corporations. There was no indication that in any of those cases these corporations had committed prior Section 3 violations. There was no indication that the competition between the companies was massive, or that it amounted to large percentages of the sales. These arguments have been specifically rejected.

JUDGE NEEDELMAN: Is there de minimus defense available to Section 3?

MR. BATTERTON: There is de minimus defense available, and that was held in the United States versus Sears Roebuck case.

JUDGE NEEDELMAN: Held in Sears. You read the schedule a little bit differently than I do.

In the Sears' case, Judge Winefeld said: "Surely, the sales of any $80 million do not come within the de minimus principle.

They are saying, the way I read the case, maybe I am reading the case -- since I don't have law clerks to read cases for me, I have to read them myself; the way I read the case, it says if $80 million is not de minimus, something else may be de minimus, and if it was something else besides $80 million, there may be a de minimus case available.

MR. BATTERTON: Judge Winefeld said: "And whether or not the two corporations would be capable of committing a Section 1 violation.

JUDGE NEEDELMAN: That is not the question I asked. Why don't you answer the question?

I asked is there de minimus defense available?

MR. BATTERTON: No, there is not.

JUDGE NEEDELMAN: On the basis of the Sears Roebuck case.

MR. BATTERTON: That portion of Sears I would like to get. Judge Winefeld said the sole question is whether or not it did, it was possible for competing, seeks to compete -- a Section 1 violation..

JUDGE NEEDELMAN: That is not what he said earlier. It is enough if some appreciable part of interstate commerce is the subject.

MR. BATTERTON: Immediately before that.

JUDGE NEEDELMAN: Monopoly, or restraints of monopoly, constant conspiracy and cites Socony Vacuum.

MR. BATTERTON: Your Honor, immediately before that, Judge Winefeld said that price fixing in territory or divisions between competitors are per se violations of Section 1 of the Sherman Act without regard to the amount of commerce involved.

JUDGE NEEDELMAN: Is de minimus defense available? under the Sherman Act?

MR. BATTERTON: Not according to the Yellow Cab case which Judge Winefeld cited.

JUDGE NEEDELMAN: Is de minimus defense ever available under the Sherman Act, Section 1?

MR. BATTERTON: That is the holding of the Yellow Cab case.

JUDGE NEEDELMAN: I thought the concept of de minimus is just a phrase that evades all law with antitrust law or otherwise that, you know, price fixing can be so inconsequential.

MR. BATTERTON: The Yellow Cab case does state specifically that there is no requirement of knowing that the size of commerce involved in the Section 1 is substantial or insubstantial.

JUDGE NEEDELMAN: You take the view that de minimus defense is a discretionary matter with the Justice Department and the Commission, that once a case is brought under the Sherman 1 theory de minimus defense goes out of the window, and it is really a matter of the prosecutor's discretion.

Is that your view?

MR. BATTERTON: That is our basic position. The Federal Trade Commission can decide, then, to proceed and then decline to proceed, but once it does proceed, there is no requirement that we find that the level of competition is above any particular level.

JUDGE NEEDELMAN: I am talking about a Sherman 1 case or a price fixing case. Is that your view, that there

is never de minimus defense available in a price fixing case?

MR. BATTERTON: Under the Sherman Act, no.

JUDGE NEEDELMAN: All right. I am rather surprised to hear that, given Judge Kinefeld's language in Sears.

MR. BATTERTON: At that particular point, Your Honor, I would note that I am quoting a portion of the Yellow Cab case which refers not to Section 1 of the Sherman Act but to a Section 2 case.

In the Yellow Cab case, the court clearly indicated that the amount of competition was irrelevant so far as Section 1 of the Sherman Act was concerned, and cited an earlier decision of the Supreme Court which I don't have before me right now which we can present to you later if you would like, and then it went on, it said: "Under Section 2 of the Sherman Act, the only question is whether or not the amount of competition involves an appreciable part of interstate commerce."

JUDGE NEEDELMAN: All right. Proceed.

Are you also going to bring up your own argument for summary judgment? It seems to me we can telescope this whole thing. Why go to that, too?

MR. BATTERTON: Okay. I would also like to point out, just to tighten this thing up a little bit before we leave this prior point that is also in the Sears case.

JUDGE NEEDELMAN: Just one final point on that. If there is de minimus defense available under Section 8, how do you explain the Paramount case where there was at least one program that Monarose's GAC subsidiary did own which could, conceivably, compete with the programs controlled by Paramount?

I think the program was Hullabaloo, or something like that. I mean, the court was, in the Paramount case, trying to find some basis for asserting Section 8.

I think they probably could have made it out of the existence of this one program, but they did not do that. I mean, the court did not do that.

Now, could you explain that?

MR. BATTERTON: I think that in that particular case, the court viewed the question as of whether or not two rather distinctly different lines of commerce were competitive.

JUDGE NEEDELMAN: Well, I want you to assume that, at least for purposes of this argument, there was one program owned by one of the corporations which competed with a lot of the programs controlled by the other corporation.

MR. BATTERTON: I am not sure that assumption is justified from the decision. I don't believe that the court concluded that there was any competition as to any of those programs.

JUDGE NEEDELMAN: But the court indicated that GAC did control one program. Namely, a program called Hullabaloo or something like that.

MR. BATTERTON: But the other corporation was engaged solely, I believe, in a talent agency.

JUDGE NEEDELMAN: No. That was the corporation. GAC is General Artists Corporation. General Artists Corporation is an agent for arts and in addition, it owned one program, namely, Hullabaloo.

Paramount Pictures, on the other hand, at least had the capability of selling many programs which would compete with Hullabaloo since Paramount owned a library of old movies which could only have been sold to the networks in direct competition with this one program owned by GAC.

Yet, the court said that this was not enough. What I am suggesting to you is: Doesn't this court, or did not the court in the Baldwin-Montrose case seem to recognize a de minimus defense?

MR. BATTERTON: Well, Your Honor, I think in that particular case, we would simply have to take the court's statements as dictum.

Furthermore, I would assert that there would be no application to this case because here, everyone has conceded that they are in the same line of commerce.

Furthermore, I would point out that in the Sears

case, it was further said that the only de minimus standard in Section 3 is that requirement that one of the corporations be worth $1 million in terms of combined gross sales and undiluted profits.

JUDGE MEDDELEAU: All right. That is neither here nor there, Mr. [illegible].

MR. BATTERMAN: SCI achieved complete victory here when Mr. Bond resigned. SCI has asserted no competitive effect of interlock has been shown. That is the first [illegible], so on and so forth.

Well, Your Honor, once again, I would simply point out that in the last three years, the Commission has had 11 cases in strikingly similar circumstances and has proceeded against the parties after the Directors resigned.

Furthermore, we have a situation here. SCI has declared itself beyond the reach of Section 8, beyond the reach of Section 3. It has declared itself above the requirements of those statutes.

JUDGE MEDDELEAU: That is not fair. It seems to me that attorneys can make argument that that statute doesn't apply to them without attaching any pejorative significance to that argument.

It seems to me that Mr. Willis is fairly entitled to make a legal argument that that statute doesn't apply to his client. That is not equivalent to saying that his client is

above the law.

Certainly, I don't want to hear [illegible] much about that. Why don't you just go on.

MR. [illegible] case. I think that basically what SCM is saying is that it is entitled to dismissal as a matter of right.

In the W. T. Grant case, in similar circumstances, the Supreme Court said that it is not enough if a Director resigns, that it is not enough to make a case moot. It is limited. It is [illegible].

[illegible] the W. T. Grant case [illegible] said that our controversy may remain after a Director resigns, and there is certainly a controversy here because complaint counsel and SCM are clearly divided over the question as to whether or not Section 8 and Section 5 of the Federal Trade Commission Act apply to SCM.

In the first place, there is a controversy remaining to be settled. On that basis alone the case is not moot.

JUDGE [illegible]: This is a rehash of what was said in the first argument. What are the reasons why we should compel a corporation like SCM to be receptive to the order, given the fact that Mr. Bond resigned?

MR. PATTERSON: First of all, Your Honor, there is no order entered. That SCM, as the court found in the W. T. Grant case, is free to return to its old ways.

Secondly, Your Honor, it is clear that the policy of simply allowing corporations to return to their old ways out of an order after a simple phone call or a letter, or whatever, is continued as a form of public policy.

JUDGE GURFEIN: Why is that? Do you want to tell me now, or would you rather not?

MR. BATTERTON: Because in the 1950s, the Justice Department called a number of corporations and succeeded in getting a Director to resign. There it was discovered that General Electric was among that list of corporations.

General Electric had more than one interlocking directorate. General Electric promised that it would not commit future violations after its directors resigned.

JUDGE NEUDELMAN: Do you have a citation on this history?

MR. BATTERTON: Yes, Your Honor, [illegible] Whitesell and Kramer, Interlocking directors in the Clayton Act after 35 Years, 59, Yale Law Journal, 1266.

JUDGE NEUDELMAN: All right. Proceed.

MR. BATTERTON: Among the resignations as attributed to the Justice Department Announcement 47, three were reportedly submitted by the Directors on the Board of General Electric.

On November 26, 1972, the Federal Trade Commission accepted a consent order with the General Electric Company which prohibits interlocking directorates.

In other words, the General Electric Company was not debarred from going back and committing exactly the same type of violation again.

So it is a matter of public policy. The Federal Trade Commission is entitled to decide in [illegible] that it can no longer simply call up companies committing a Section 8 violation and request them to remove the offending Director from their Boards.

JUDGE NEEDELMAN: Let me ask you something, Mr. Batterton. Refresh my recollection again. This is probably none of my business, but out of curiosity if nothing else. the Federal Trade Commission, if I remember correctly, had a rather extensive -- in fact, there may have been press releases on this -- an extensive program directed toward interlocking directorates in the late 1950s or early 1960s. Is that correct?

MR. BATTERTON: Are you referring to the Federal Trade Commission's 1950 study of interlocking directorates?

JUDGE NEEDELMAN: I am talking about an enforcement program.

MR. BATTERTON: Enforcement program?

JUDGE NEEDELMAN: Right.

MR. BATTERTON: This raises a question. SCM has presented, or SCM has left the impression that it has been the consistent policy of the Federal Trade Commission to

dismiss complaints after the offending Director has resigned.

Now, we have gone through the dockets numbers SCM has set out. We have discovered that this has happened only three times in the history of the Federal Trade Commission that we know of.

In two of these files the motion to dismiss was opposed by complaint counsel. In one instance in 1953, the Federal Trade Commission did dismiss a complaint after the offending directors resigned.

JUDGE NEEDELMAN: No. That is not what I had in mind... I am just trying to refresh my recollection [illegible] time. I would go over the old press releases, but I do not have the time.

Did not the Federal Trade Commission have an enforcement program relating to interlocking directorates, say, in the early thirties or the fifties, or am I mistaken of that?

MR. BATTERTON: We are unaware of any press releases like that.

JUDGE NEEDELMAN: I thought there was a public press release involving the interlocking relationships.

MR. BATTERTON: I am not aware of any press release like that, Your Honor.

JUDGE NEEDELMAN: Was there not a public press release relating to an enforcement policy respecting the

latest interlocking directorate cases filed by the Federal Trade Commission?

MR. BATTERTON: There is none that we know of, Your Honor. The Federal Trade Commission [illegible] discussed [illegible] the types of [illegible] in the [illegible] and what it has done with them.

JUDGE MENDELMAN: No, but before the Federal Trade Commission kicks off the major enforcement efforts or even among our investigation level, it announces publicly that we intend to vigorously enforce the [illegible] Section [illegible] of the Rules. [illegible]

Has there been such a policy announcement in this particular instance?

MR. BATTERTON: We are not aware of any such policy announcement, but we feel, after three years of a consent order against a corporation, we believe that is the present policy of the Federal Trade Commission.

JUDGE MENDELMAN: All right. Proceed

What about the point that Mr. Willis makes that the Act does not apply to corporations?

MR. BATTERTON: We think, Your Honor, first of all, you have to go back to Section 11. Section 11, even before the Ninth Amendment which SCM has referred to, gave the Commission the power to order a corporation to [illegible] the Board of an interlocking director.

Now, there are several points I would like to make in this connection. First of all, SCM has claimed that Section 11, in its proceeding, was only designed to allow the Federal Reserve to act to order banks to remove offending directors.

In fact, Section 11 applies to the Federal Trade Commission which doesn't have jurisdiction over banks and, therefore, has always enabled the Federal Trade Commission to order corporations like SCM to remove from their boards offending directors.

SCM has argued that Section 11 is only a procedural statute, and it can only apply to those persons within the purview of Section 9.

However, a person, under the Clayton Act, includes the term 'corporations' and furthermore, Your Honor, we find that the prohibition of interlocking directorates in Section 8 simply sets out the statute; it is not clear on the obligation to comply with prohibition against the Director sitting on the Board of a competing corporation.

It is to rest solely on the shoulder of that individual Director. And in light of Section 11 language which allows us to order a corporation to rid its Board of an offending Director, it is only reasonable to assume that the responsibility also rests on the back of the corporation which places on its Board a Board Director of a competing

corporation.

Furthermore, Your Honor, we also argued that -- [illegible] -- that [illegible]

[illegible] complaint counsel have [illegible] the Federal Trade Commission has held that it is an obligation of a corporation under Section 5 of the Federal Trade Commission Act regardless of any obligation under Section 8 to keep off its Board of Directors [illegible] or corporate management [illegible] the Board of Directors or the management of competing corporations.

That is the Central Linen Service Company case, 64 FTC, 1307, which was issued in 1964.

JUDGE MENDELMAN: Do you have a citation there. Is that an FTC opinion or a District Court opinion?

MR. BATTERTON: That is an FTC opinion.

JUDGE MENDELMAN: Do you have the citation?

MR. BATTERTON: 64 FTC 1964.

JUDGE MENDELMAN: 1307?

MR. BATTERTON: Yes. That was not a Section 8 action. It was a pure Section 5 action. The Commission entered an order against Central Linen Service in which Central Linen Service was ordered to cease and desist from placing on its Board of Directors and from having any officer

of its corporation serve on the Board of management of a competing corporation.

JUDGE NEEDELMAN: Central Linen [illegible] [illegible] a conspiracy case, [illegible] [illegible]

MR. BATTERTON: Also, interlocking.

JUDGE NEEDELMAN: If you [illegible] [illegible] a conspiracy, I assume they are entitled to all kinds of fancy things.

What does that have to do with this case? We are not talking about a conspiracy. [illegible] [illegible] as Mr. Willis [illegible] [illegible] [illegible] automatically triggers or, if you will, does not automatically trigger Section 8.

I assume that if you show conspiracy between SCM and Grafton, you are entitled to further relief than just getting rid of the Board.

MR. BATTERTON: We are not talking about relief.

JUDGE NEEDELMAN: Prove conspiracy. I remember Central Linen very well.

MR. BATTERTON: Their allegation was excellent. There was a conspiracy.

JUDGE NEEDELMAN: Price fixing.

MR. BATTERTON: Part of the case involved price fixing, and part of the case involved the interlocking between Central Linen and other respondents.

JUDGE NEEDELMAN: That was price fixing, and these guys were all in bed together.

MR. BATTERTON: There is no indication that the case I was quoting today because another part of the case involved this conspiracy which was involved in General [illegible] and other respondents.

JUDGE NEEDELMAN: Let me just get to that and ask: Is it your view that if the statute -- let's assume that the statute was more explicit on this point, and the statute said that there is no corporate liability under Section 8, can the Commission pull it, sort of, out of the [illegible] in space, by bringing an independent case under Section 5?

MR. BATTERTON: Yes, it clearly can. Under the doctrine leading the Hodgkinson case, it can, and under the doctrine set out in the Grand Union case.

JUDGE NEEDELMAN: The Grand Union case would be the exact opposite because in the Grand Union case which, in essence, applies -- it is beyond me how -- but let's assume that the Congressional purpose was clear in that the corporation was not to be sued and in the Grand Union case, the theory of Grand Union is that the Commission may fill in a like "hole" in the statutory framework and better realize the Congressional purpose.

What I am saying is assuming the Congressional purpose was clear that corporations are not to be sued under

Section 5, you are telling me that you can just bring in Section 5 and say we don't care what Congress said. We still have Section 5.

MR. BATTERTON: Section 5 does say that compensations shall not be illegal for interlocking directors. Section 11 clearly places an obligation to keep directors of competing corporations off their Board so it would be clearly in furtherance of the policy of Section 8 to mandate, under Section 5 of the Federal Trade Commission Act, that companies keep off their Boards directors of competing corporations.

The Sperry-Hutchinson case is well-known because it says that the Federal Trade Commission Act, notwithstanding the rules of the antitrust laws, can go ahead in furtherance of the spirit of those laws to prohibit certain unfair practices.

JUDGE NEEDELMAN: So you are using Section 5 here in the way it was used in Grand Union.

MR. BATTERTON: Yes. I think we are.

JUDGE NEEDELMAN: So you say it is a regulatory function of the FTC. It can perfect the Congressional purpose and cure these much more technical defects and statutes.

MR. BATTERTON: That is correct.

JUDGE NEEDELMAN: By invoking Section 5.

MR. BATTERTON: That is correct.

JUDGE NEEDELMAN: All right. You don't have to

spend too much time on that. Why don't you proceed? All right?

MR. BATTERTON: I think, Your Honor, I would like to turn to the motion for summary decision on this point.

JUDGE NEEDELMAN: Okay. I wish you would. I would like you to start with the question of whether you have enough right now to meet the summary decision, or all you have is Mr. Saxton's affidavit.

First of all, do you have any precedent, one party, to move for summary decision on the basis of an affidavit filed by another party?

MR. BATTERTON: This is not based solely on the affidavit of another party, Your Honor.

JUDGE NEEDELMAN: Just answer that question first. Okay?

MR. BATTERTON: At this particular point, Your Honor, we would not be prepared to give you a detailed legal memorandum on that point. If you think that such a memorandum would be necessary before you could reach a decision as to that point, I would be happy to provide one.

In any event, that affidavit is clearly usable against SCM.

JUDGE NEEDELMAN: Necessarily. I would have to accept everything, the allegation that Mr. Saxton says in his affidavit. Right?

MR. BATTERTON: No. I think that you have grounds for summary decision with or without the Sutton affidavit based on information that Mr. Tasker has presented in his affidavit.

JUDGE NEEDELMAN: I will tell you right now the basis of Tasker's affidavit. It is not terribly impressive, Mr. Tasker's affidavit. What does it say? Did he happen to see a publication?

First of all, he went to one publication.

MR. BATTERTON: That is not correct. If you look further in the ads you will see that edible oils and, I believe, shortening are also mentioned in those advertisements.

JUDGE NEEDELMAN: Now, let's assume you are right about that. Mr. Tasker finds a publication where both respondents advertise. Correct?

MR. BATTERTON: Correct.

JUDGE NEEDELMAN: This is all he says in his affidavit. What else does he say in his affidavit?

MR. BATTERTON: That is basically correct.

JUDGE NEEDELMAN: How does that prove competition, the fact that they both advertise?

MR. BATTERTON: The fact that they hold themselves out to the same customers as being in the same line of commerce and offering the same product.

JUDGE NEEDELMAN: I don't follow you. Let's assume

that you have the publication called "Bakery World", and it is directed toward institutional buyers and the companies both advertise in that publication.

[illegible] That would hardly prove [illegible] both trying to sell to the same class of customers?

The fellow may be advertising because he knows that the readership includes people who aren't necessarily buyers of the product but may be interested in seeing the ad anyway.

MR. BATTERTON: We think it is strong evidence, Your Honor.

JUDGE MENDELMAN: You have to go into the readership.

MR. BATTERTON: The readership is indicated in the affidavit. It is indicated in the photocopy pages from the magazine.

JUDGE MENDELMAN: What does it say? Refresh my recollection. I am sorry.

MR. BATTERTON: It says that that magazine is directed to the institutional food trade, and it specifies a number of businesses to which this magazine is directed.

JUDGE MENDELMAN: You must admit, certainly, you can see that that is a pretty weak affidavit. I mean, to support a summary judgment.

I think Professor [illegible] would recommend summary

decision on the basis of that kind of affidavit.

MR. BARTERTON: The Mi case. In light of our information, I would say that affidavit is quite sufficient.

JUDGE NEIDELMAN: What case?

MR. BARTERTON: The Mi case which was introduced in Mr. Barker's memorandum in support of our motion for summary decision. RK Products Company versus Capital Vitamin, and the citation on that is 351 F 2nd 930.

JUDGE NEIDELMAN: 351 F 2nd what?

MR. BARTERTON: 930.

JUDGE NEIDELMAN: I am just a little surprised. After all, I assume that staff of the Federal Trade Commission know: to look a little more, to learn about these companies than what they read in trade publications.

Is that all you have, the fact that Mr. Tanker reads trade publications?

MR. BARTERTON: Once again, on SCM we have Mr. Saxton's affidavit in which SCM has made an admission it is in competition with Kraftco.

At the very least, Your Honor, we would submit that the following issues are totally settled at this point.

JUDGE NEIDELMAN: Do you know what Kraftco's sales of barbecue sauce are?

MR. BARTERTON: From the information I have seen I would estimate they are in the range of $3 million.

JUDGE NEEDELMAN: SCM: Barbecue sauce sales of $3 million too. Are these the kinds of products that you usually see in the Safeway, barbecue sauce?

MR. BATHERTON: I should think so, Your Honor.

JUDGE NEEDELMAN: You mean to tell me that under the Federal Practice Rule 56, which requires that all inferences be drawn against the proponents of summary decision, that I can rule on summary decision simply based on Mr. Tasker's affidavit?

Let's put apart Mr. Sexton. Is that your interpretation of Rule 56 practice?

MR. BATHERTON: I think that you have correctly stated Rule 56. Yes.

JUDGE NEEDELMAN: Under Mr. Tasker's affidavit, don't I have to draw some inferences from the fact that ads appeared in the same publication?

MR. BATHERTON: It is not clear to me, Your Honor, that the Rule 56 applies to this admission.

JUDGE NEEDELMAN: The Federal Trade Commission has held that Rule 56 applies.

MR. BATHERTON: Then, of course, we would have to apply the Rule 56 to this particular affidavit.

JUDGE NEEDELMAN: Under Rule 56 practice, the inferences are supposed to be drawn against the proponent of a motion, not in favor of the proponents.

MR. BATTERTON: Correct. In that case, that is what we would have to do in reviewing this affidavit.

JUDGE MENDELMAN: I can just infer here, well, I: that I [illegible] magazine, and it [illegible] that these two companies advertise in this publication.

I draw no inference, one way or the other, whether this shows competition between the companies. As a matter of fact, one of these two companies may just have thought it would be nice to have their ad in that bulletin.

There is another problem. You will recall in the Baldwin-Montrose case, the court said that we are talking about actual competition, not potential competition. In a Section 8 case, it could be.

MR. BATTERTON: This is not entirely a Section 8 case. This is also Section 5.

JUDGE MENDELMAN: It is premature. Well, the inference could be drawn that one of these companies was not in their business, and that there is an attempt to break into this business. Therefore, it is potential competition.

MR. BATTERTON: We cannot draw that inference because both have admitted they are in these lines of commerce.

JUDGE MENDELMAN: I don't know. All I am saying is that under Rule 56 practice, we are not writing proposed findings. We are not talking about [illegible]. After both sides have had a chance to answer questions, Rule 56 practice

is something else entirely.

The rules are that the proponents of summary decision have a pretty [illegible] burden. You have to show that there is no substantial fact in dispute, show that Mr. Tashof's affidavit [illegible] all.

It seems to me that Mr. Tashof's affidavit raises all kinds of questions. It doesn't help you on that.

MR. BATTERTON: I think that at the very least, what we have you here is evidence that the companies are holding themselves out to the same class of purchasers in a magazine of national circulation.

JUDGE NEEDELMAN: Go on. You want me to, essentially, decide on the basis of, first, the Saxton affidavit.

MR. BATTERTON: I think you would have ground to decide at least against SCM, against the Saxton affidavit, yes.

Now the following issues are simply not in dispute at this point at all: Both Kraftco and SCM admit in their answers.

JUDGE NEEDELMAN: I know that they have millions of dollars worth.

MR. BATTERTON: That is right. Millions of dollars. Engage in commerce. They have also admitted interlock at the time the complaint was issued.

JUDGE NEEDELMAN: Let's go to the competition. That is what I am interested in.

MR. BATTERTON: Kraftco and SCM both sell barbecue

sauce and edible oils and margarine.

JUDGE MENDELMAN: Kraftco denied that. Since you chose to plead this complaint in the language of Section 7, Kraftco's answer is a denial of [illegible] of the complaint.

Kraftco said that Kraftco denies the allegations of paragraph six that Kraftco and SCM, by the nature of the business, being in the margarine, edible oils and barbecue sauce business and because of the location of such operations, are competitors of each other. So how can you say that?

MR. BATTERTON: My statement is that they have admitted they are in the same lines of business that they both sell margarine, edible oils and barbecue sauce. That is clear from both answers.

JUDGE MENDELMAN: One sells on the East Coast, and the other one sells on the West Coast. Are they competitors under Section 8?

MR. BATTERTON: We assert in that Jackson affidavit, conceded a legal conclusion that it is in competition with Kraftco. Therefore, it is axiomatic that because of this, the nature of their business line, the companies' location thereof, they are competitors.

JUDGE MENDELMAN: We have had this rather pointless discussion. Aren't you essentially relying on the line that is in Jackson's affidavit, the line that reads as follows:

"SCM's annual sales of barbecue sauce are probably $3 million. Some of these sales may meet in competition of barbecue sauce sold by Kraftco. Kraftco has not filed an affidavit denying that.

You haven't filed an affidavit denying that. Is that what your case is about?

MR. [illegible]: That is essentially what the case is about.

JUDGE NEYDELMAN: All right. Fine.

MR. [illegible]: That is enough ground to grant our motion for summary decision right there, Your Honor.

Furthermore, Your Honor, SCM went on to admit that it sells edible oils, that same class of sales that SCM has.

In the memorandum of law supporting its motion for summary decision, it further admits that at least some of those sales of edible oils went to the same customers to which Kraftco sells and finally, SCM did not deny or offer any evidence in rebuttal to Mr. Tusker's affidavit assertion that both SCM and Kraftco solicit margarine sales from the same class of customers.

JUDGE NEYDELMAN: I thought Mr. Sutton's affidavit has several answers of that.

MR. [illegible]: Mr. Sutton's second affidavit simply said that he had [illegible] SCM and Kraftco both sold to the institutional trade.

JUDGE NEEDELMAN: In the Rule 56 practice, that puts it in doubt. You seem to have a wrong view of what Rule 56 is.

The issue in [illegible] is as to whether SCM's margarine sales are made to the same class of customer as Kraftco sales.

Under the Rule 56 you just can't come in and, I suppose, dispose the issue and say: "Let's go home."

They have put it in. They have put in the issue in doubt. [illegible] motion for summary decision.

MR. BATHERTON: Mr. Sexton has not denied that SCM and Kraftco sell to the institutional trade in their margarine business. He has not denied that they hold themselves out as suppliers of margarine to the bakery institutional trade.

He said that his prior affidavit might have been incorrect.

JUDGE NEEDELMAN: All right. That is what you have. Is that it?

MR. BATHERTON: I think that we have -- yes, I think that concludes our argument.

JUDGE NEEDELMAN: Do you want to respond to any of this, Mr. Willis?

MR. WILLIS: No. I think Your Honor has been very patient with us. I think I will just make one comment. Our

thing I think that they have not said to Your Honor is that we would be prepared to rest this entire case on this record.

I think that Your Honor put to them the Rule 56 standard with accuracy, but I think under the Commission rules, too, affidavits by persons with personal knowledge of the facts with respect to the merits of this case. [illegible] differences.

JUDGE NEEDELMAN: Why aren't they entitled to something like Mr. Saxton's bald statement? What is the answer to my question? Can the Government have [illegible] summary decision based simply on your affidavit?

MR. WILLIS: I have never seen that done.

JUDGE NEEDELMAN: I never heard of it.

MR. WILLIS: I don't know of any precedent. Certainly, we stand by Mr. Saxton's affidavit. We try to, in that affidavit, be as open and candid about what we know about what the situation was that we were sued.

JUDGE NEEDELMAN: Simply on the basis that Mr. Saxton has said that SCM's annual sales of barbecue sauce are approximately $3 million. Some of these sales are made in competition with barbecue sauce sold by Kraftco.

Then, in fact, SCM refines margarine and edible oils which it sells to industrial and food service customers. Kraftco also refines edible oils for its own use and for sale to some of the same class of customers. Is that enough for

summary decision?

MR. WILKES: I don't think, Your Honor, that is that volume of sales. We don't have a various kinds and quantities that are sold to various persons in different sections of the country.

For example, [illegible] sold by SCM is a very localized product. I doubt that you could find it in the stores in this area.

There are many issues that go not only to whether or not there is a violation, but the kind of relief that would be appropriate, and I think would be necessary for hearing with respect to that.

JUDGE [illegible]: The sum total is pretty big. Edible oils; are they in competition?

MR. WILKES: The problem, of course, you see, we don't have any evidence with respect to what SCM or Kraftco does.

We know what is alleged. We know what their answer is, but there is no affidavit before you that is admissible against SCM as to what Kraftco's products sales are in any of these areas.

But the thing that stood out to me in listening to Mr. [illegible] is that the complaint apparently was issued by the Commission on a rather thin factual background.

We have before Your Honor, I assume, all the facts

that they have, and I offer that as further evidence that the Commission [illegible] expect Your Honor to [illegible] [illegible] [illegible] something and to advise the Commission as to what ought to be done about this Commission.

And you ought not to be under the impression that this Commission has, by the issuance of the complaint, prejudged or made a decision as to what they think ought to happen here.

JUDGE [illegible]: I don't know. What the Commission may think is not of major concern to me. I can assure you that I am not in awe of what the Commission thinks when it had reason to believe that there has been a violation of law.

I couldn't care less what the Federal Trade Commission thinks about violations of law. I consider myself to be quite independent of the Commission on matters of fact and the applicable statutes.

I really couldn't care less about what the Commission thinks on matters of discretion, how it uses its resources. Then it seems to me I am out of my element to get involved in that area.

I am not sure I know how to handle this thing. Let me ask you one further question, Mr. Willis. Let's assume I were to deny a cross-motion for summary decision. What else do you [illegible] [illegible] this hearing?

MR. WILLIS: You said you would deny the cross-

motion.

JUDGE NEIDERMAN: If I were to deny both motions,

MR. WILLIAMS: Deny both motions,

JUDGE NEIDERMAN: Yes.

MR. WILLIAMS: If Your Honor does deny our motion, we will require some discovery with respect to what the Commission had, the facts with respect to [illegible].

We will require some discovery with respect to handling prior complaints in support of our defense that there has been no uneven treatment of the people in the SCM situation [illegible] this Commission.

We would like access to some of the records or files with respect to some of those other matters. These are areas that we would want some discovery into.

JUDGE NEIDERMAN: What about you, Mr. Bloch? What will you need?

MR. BLOCH: I think, Your Honor, that in denying the motion under Rule 3.24, denying our motion for summary judgment, you would have to make findings of the issues that were not in dispute.

Our discovery would then be limited to those matters which you set down that had to be tried.

I would assume that if you were to deny our motion, it would be in the area of the question of competition, whether or not there was competition in the three areas of

barbecue sauce mix, barbecue sauce, edible oils and oleo-margarine.

Our inventory, accordingly, would probably be primarily [illegible] from the [illegible] corporations of [illegible] they do both sell, but in these same products to the same classes of customers.

I doubt, though, that our discovery, assuming, again, that that was the area in which you felt that material issues of fact remained to be resolved, our discovery would have to be very extensive.

JUDGE NEEDELMAN: It would have to be what?

MR. BLOCH: I don't think that it would have to be very extensive in that area. I think that these matters could be easily disposed of.

As a matter of fact, I wouldn't be surprised but that they couldn't be disposed of by stipulation.

JUDGE NEEDELMAN: That is what I was going to suggest. It seems to me, Mr. Willis, that this matter really should be submitted to the Commission.

It seems to me that you have earnestly presented arguments which, essentially, go to the Commission's policy-making discretion.

Apart from your argument about the statutory question of corporate liability under Section 4, for the life of me, I can't see why the case cannot be submitted to the Commission

on the basis of a stipulated nature, particularly, you know, where Kraftco has indicated that it will not press this matter.

It seems to me that you have almost an independent source of information here with respect to contested facts, if there are any.

I am willing to bet that the people at Kraftco, without too much difficulty, can tell you exactly, precisely where these companies do compete in a format which would be acceptable as an accurate statement to both sides.

I just can't believe that these businessmen don't know where they compete. The lawyers may not know, but the businessmen know. And they know how much is involved, and they know the areas of the country, how many dollars are involved.

At the same time, I think Mr. [illegible], perhaps with a little persuasion on my part, I will give you what you want in terms of any arguments you want to make about abuse of discretions, possible violation, even, of your constitutional rights.

It seems to me, though, that minimally, you would be given the number of companies that they have sued, say, over the last, whatever is a reasonable period. What do you want, ten years? What the disposition has been of those cases, and I would say that if there is an internal policy

document which ordinarily you would never get under any mode of discovery, which Mr. Birch would say, he would let you look at it so you can assure yourself that you are not being singled out unfairly.

It seems to me that what you need the discovery rules, unless you have something more than an uneasy feeling, that is not enough to compel discovery of the internal documents.

In other words, unless there is more than just a hunch, there has to be something more under the Commission discovery, District Court discovery, for compelling discovery into the internal processes of an agency.

Now, if you can show, Mr. Willis, something which indicates ---

MR. BIRCH: I am prepared to say at this point that if you would order discovery of such an internal document of the Commission, if such a document ever existed and it can be found, I would have absolutely no objection to turning that document over to Mr. Willis under order because I think it is totally irrelevant.

JUDGE NEUDELMAN: What I am going to ask is that you turn it over voluntarily. I would rather not establish precedent.

MR. BIRCH: I am not sure that it would be proper for me to turn that over voluntarily.

JUDGE WEIDEMAN: I would accommodate you. What I am saying is that that is where I put this question to Mr. Patterson.

If there has been a formal Commission vote to drop Section 8, and if there is an internal document which describes the policy reasons behind that vote, I think Mr. Willis is entitled to see that document if for no other reason than to assure himself that there is no personal vendetta against FCM.

Unless there is a personal vendetta against FCM, I don't think you are entitled to discovery on that. I am talking about the internal Commission processes, and it is not enough for you to come in and say: "I suspect that I am being singled out unfairly here."

There has to be something more than this mere suspicion. If you can, I think it might be, probably, in the public interest to dissuade Mr. Willis from harboring this kind of feeling that he is being persecuted.

As far as giving him the other material which he needs to make whatever arguments he wants to make before me and the Commission and the reviewing authorities about enforcement, I think that you can give that to him.

It seems to me that it is easier for you to do the research than it is for them.

MR. BLOCK: It is public record information anyway.

JUDGE [illegible]: Then they have to find this material. It seems to me that you can easily identify the companies which have been investigated, the companies we investigated and stopped, the [illegible] we complained [illegible] been issued, and the companies which you have taken a look at them and given another order.

It seems to me that you can put that together for him, and let Mr. Willis respond.

I prefer to see this matter submitted to me on the basis of [illegible] that of stipulation rather than for me to [illegible] the other limits of Rule [illegible], which is the proper basis of summary decision.

I would rather have the parties say: "Fine, here are all the facts, and let's argue this thing before the Commission and the Administrative Law Judge and the courts, if necessary."

MR. WILLIS: Your Honor, certainly if you deny our motion and the Commission does not see fit to end this case now, we would do everything we could to cooperate with complaint counsel to work out either stipulations or discovery. On such matters, we are not trying to make this any more complicated than it is, but I do submit that the two matters that we have pressed here today, that is, the W. T. Grant type of approach and the scope of Section 5, are ripe for Your Honor's decision.

There are no disputed facts with respect to those two matters and if we are correct on either of those approaches that should end the matter as it is.

[illegible] would want the Commission to rule on, in an interlocutory manner in the meantime.

JUDGE NEEDELMAN: I prefer not to. I prefer to send nothing to the Commission in an interlocutory manner.

Respectfully, Mr. Willis, I prefer not to rule on a case in the manner that you want me to rule on it. I prefer to send a complete package to the Commission where you prefer to have all of your arguments about mootness, about Section 3, but at the same time, the Commission has before it the rather simple facts which it needs to decide a Section 3 case on the merits.

It seems to me that this is not terribly complicated, that the simple facts of this kind of case can be fairly presented to the Commission so that the Commission has the whole thing in front of it.

I would prefer to deal with all of the issues at one time: Your arguments, the substantive issues, everything at one time.

Obviously, I cannot force you to do that. I prefer to remain put with your motion. Thus, I will rule on your motion in due course.

The way I would prefer to have this case handled is to give you 30 days to enter into stipulation covering all issues and submit the case to me in a stipulated record.

But obviously, I cannot twist your arm any more than I have.

MR. WILLIS: Obviously, we would like very much to be guided by what Your Honor has indicated, but these are matters which we put a lot of effort into, and which we believe are dispositive of the case. We would like Your Honor to rule with respect to our motion.

JUDGE MERHIGAN: I eventually will rule on the issue; I promise you.

What I am saying is that I prefer not to have to do this more than once. I prefer to have all of the issues in front of me: Your argument about novation, your argument about Burton 8 or about endorsement; his arguments about the nature of competition between these companies, and whatever other substantive points you want to make.

I would rather have all of these issues in front of me in the stipulated record because I don't think that these issues require an expensive or extensive trial.

MR. WILLIS: I don't disagree, Your Honor, there. Let me make this suggestion. If you would give us those 30 days to consult with one another, to see what problems we have in this case before you press either of us for a decision

as to whether we would like to press you, Your Honor, for decision on these motions.

Would that be convenient? We will know whether we have a problem in order, probably, but I don't want to fix to withdraw our motion. I think Your Honor understands our thinking.

MR. BLOCH: Your Honor, may I be heard for a moment?

JUDGE NEEDELMAN: Surely.

MR. BLOCH: It seems to me that given the history of the motions for delay and continuance that SCM has followed Mr. Willis's request is, perhaps, unjustified.

JUDGE NEEDELMAN: He is talking to you.

MR. BLOCH: I think we can talk on the record right here today.

JUDGE NEEDELMAN: I am not going to listen to stipulation.

MR. BLOCH: I am not talking about entering into stipulation. I think it can be discussed right now, agreed to right now, whether this is a matter we are going to pursue, the method by which we are going to pursue this matter, whether Mr. Willis prefers to push the Judge to rule on his motion.

JUDGE NEEDELMAN: Look, I am not going to console you, Mr. Bloch. You are a very experienced attorney. I don't think that that is the right tone to adopt when you are just about to approach an adversary in a conspiracy.

Let's just forget it. Look, I have heard enough. I don't want to hear any more about this. Here is what I am going to do: I will give the parties 30 days.

In that, it seems to me that you can work with the of your problems in 30 days, including getting Hunter's material up to me. I will give the parties 30 days to do all of the following:

Enter into a factual stipulation covering all issues. That includes what is necessary for that fact, for the stipulation, which is that you will have over to me. Whether any internal document reflecting Commission policy.

I am ordering you right now to do so. Okay. I mean the internal document reflecting the most recent Commission policy.

MR. BLOCH: Policy with respect to Section 8 enforcement?

JUDGE MELTZER: With respect to Section 8 enforcement. All right.

Within that 30 days, I am giving you 30 days to enter full factual stipulation. Within that 30 days, you may file additional affidavits. Both sides may file additional affidavits in support of cross-motion for summary decision.

Within the 30-day period, both sides may file supplemental briefs in support of summary decision. Within the 30 days, if you no longer are talking to each other, I

would suggest, although I am not going to hold you to this, that you both stop thinking and perhaps file -- in fact, I would encourage you to file your first applications for discovery, looking toward a trial. All right.

I will hold in abeyance for at least 30 days ruling on the motion for summary decision.

At the end of the 30 days, depending on what I have in front of me, I will probably move quite quickly on ruling on both motions for summary decision.

Frankly, what I would encourage you to do is to just package this thing in a format where both of you get what you want.

It seems to me that you can do that in this case without getting involved in a great deal of controversy.

MR. BLOCH: I should hope so. I agree with you 100 per cent, Your Honor, that the facts in this case are relatively simple. There should be no reason why we can't get this stipulation out.

My only reservation is with the holidays coming up now, perhaps those 30 days might better be put to the first of February.

JUDGE NEDELMAN: Thirty days is adequate.

MR. TASKER: Your Honor, in the unlikelihood that something happens that the Board of Knuffco does not approve the settlement, do I understand that this would prevent order

means that if we want to file anything in opposition to the motion for summary decision that it can be done within 30 days?

JUDGE MEDELMAN: Surely. You are to include -- actually, what I meant, with particular reference to Hamilton, I meant to extend the period to work out problems you have with respect to the Board; get the establishment in 30 days.

If the establishment falls through, then you come within the 30-day period, too.

MR. SMITH: If the Carlson affidavit applies to us, as to that matter, I don't want to burden the record on that matter now if that is the case.

JUDGE MEDELMAN: That is what I am trying to say. I am giving you 30 days to try to work out, perhaps file additional support for your affidavit otherwise, thinking about a trial.

I will set this case down for early trial. I will tell you that much. Both sides should not be overly optimistic as to the extent to which I am going to allow discovery.

I may allow a little, but it is going to be very closely supervised discovery. I assume, Mr. Willis, that you are familiar enough with FTC practices, that within District Courts, we do not have, at least under current rules, we do not have free-wheeling discovery at FTC.

MR. WILLIS: I have heard that. I have also heard there have been such cases with freewheeling discovery.

JUDGE MIDDLEMAN: As a matter of fact, I have been the Administrative Law Judge in several of them much to my regret.

MR. WILLIS: We are not interested in prolonging this, Your Honor. I think Your Honor understands our position here. We make it sincerely, and our effort is not to slow anything up.

As far as getting along with complaint counsel, this is my first time to have met them, and you will find that we will do our best to cooperate with them.

There have been several extensions of time to answer, but this was while they were negotiating with the other two parties. We just went along with the adjournments.

JUDGE MIDDLEMAN: That was my decision. I have always given all the parties all the extensions so I don't think you should necessarily make too much of this, Mr. Bloch.

It seems to me that no matter what you had, no matter what you have read about SCM, SCM automatically would have had the benefit of any extension I gave for any purpose to any party.

MR. BLOCH: I have no quarrel with that, Your Honor.

JUDGE NEEDELMAN: All right. Let me assure you, Mr. Willis, that no matter what the format in which it is presented, I will take up each one of your arguments so your arguments are going to be treated one way or the other whether they be in cross-motions or in stipulated record.

You can make the same approach. By the way, in fact, I have done this in a recent case, you can file stipulation and then just as a matter of procedure, move cross-motion.

It doesn't really matter. Once there is a stipulated record it seems to me that the case is ripe for decision.

I think in this kind of case, this is the way it ought to be, and I think I have said all I can say about that. I can't force parties to stipulate.

I can only give you my view, that I think these businessmen know where they compete and where they don't compete and if it is of any guidance to you, it seems to me that it would be more useful to concentrate, for purposes of this case, on an area where there is no conflict.

There are marginal areas where one is trying to break into another's market. Perhaps you can just forget about that, and perhaps that is true of the entire business. I mean I just don't know.

But it seems to me you ought to try to simplify

things in terms of competition, particularly in the view of Mr. Batterton's opinion that there is no de minimus defense here at all but be that as it may, you will do what is appropriate.

Do you have anything that you want to discuss today? Let me see if I have covered everything.

It has been a long conference, but I am certainly willing to take up anything else that you think has to be said.

I hate to put parties to the expense of making these trips. Is there anything that we can dispose of now?

Let me just check the order again. Point 3 of the order is, obviously, premature, but I will set an early hearing date and, well, as I said, the discovery, if there is a complete breakdown, it seems to me that you can at least start thinking in terms of the possibility that I might deny the pending motions, and you will have to move into a trial posture.

I am not going to set January 19th as a final date for discovery applications, but I think this will be so soon after that if there is a complete breakdown so that you better start thinking during the next 30 days about what you are going to need because this may come very soon after January 19th if things break down, and if I do not grant one or the other of the motions for summary decision. I don't see

anything else.

MR. BLOCH: I have nothing else.

JUDGE NEEDELMAN: Mr. Datterton?

MR. DATTERTON: No.

JUDGE NEEDELMAN: Mr. Willis?

MR. WILLIS: No.

JUDGE NEEDELMAN: Thank you all very much.

We are adjourned until the next prehearing conference which I will set on ten days' notice.

(Whereupon, at 12:10 p.m., the prehearing conference on the above-entitled matter was adjourned.)

0A

E

ORIGINAL

OFFICIAL TRANSCRIPT OF PROCEEDINGS

BEFORE THE

Federal Trade Commission

DOCKET NO. 9035

In the Matter of:
KRAFTCO CORPORATION
a corporation
SCM CORPORATION
a corporation
and
RICHARD C. BOND
an individual

Place WASHINGTON, D.C.

Date NOVEMBER 10, 1976

Pages 1 thru 59

ACME-STENTRAN COMPUTER REPORTING COMPANY
Official Reporters
1411 K Street, N.W.
Washington, D.C. 20005
(202) 638-7211

DOCKET NO: 9035

CASE TITLE: KRAFTCO CORPORATION, et al

HEARING DATE: November 10, 1976

I HEREBY CERTIFY that the proceedings and evidence herein are contained fully and accurately in the notes taken by me at the hearing in the above cause before the Federal Trade Commission and that this is a true and correct transcript of the same.

DATE:

Dennis Dafnis
(Signature of Reporter)

FOR: Edward Castagna, Reporter
BY: Dennis Dafnis, Contract Admin.
(Name of Reporter - Typed)
Acme-Stentran Computer Reporting Co.
1411 K Street, NW
Wash., D.C.
(Address - Typed)

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

- - - - - - - - - - - - - - - - - -x

In the matter of :

KRAFTCO CORPORATION, :
a corporation,
:
SCM CORPORATION,
a corporation, : DOCKET NO. 9035

and :

RICHARD C. BOND, :
an individual
:
- - - - - - - - - - - - - - - - - -x

Federal Trade Commission Bldg.
Pennsylvania Avenue and Seventh St., N.W.
Washington, D.C.
November 10, 1976

Met pursuant to notice at 2:00 p.m.

BEFORE:

CALVIN J. COLLIER, Chairman

PAUL RAND DIXON, Member

DAVID A. CLANTON, Member

APPEARANCES:

W. E. WILLIS,
For Respondent

A. HECHTKOPF,
Complaint Counsel

PROCEEDINGS

CHAIRMAN COLLIER: This afternoon we have oral argument in Docket 9035, entitled, Kraftco Corporation, et al.

This is an appeal by SCM from an initial decision, and we will recognize SCM for argument first. You have 45 minutes, as I believe you were previously advised. You may begin and you may reserve such time as you would like for rebuttal.

MR. WILLIS: If I may, I would like to reserve five minutes for rebuttal.

Mr. Chairman and Members of the Commission, Section 8 of the Clayton Act has been on the books now for well over 60 years. This Commission has been charged with its enforcement since its inception, yet this afternoon is the first time that a case under Section 8 has come on for decision before this Commission.

This does not mean that Section 8 has been violated over all of these years, nor does it mean that this Commission has not been strong in the enforcement of the Section. Proceedings have been brought, many of which ended upon the resignation of the Director. Some investigations were commenced which ended upon the resignation of the Director. Some complaints were filed which ended with Consent Orders.

We have in this case, I submit, an opportunity for

the Commission to formulate such policy guidelines in this area, particularly with respect to the situation where a Director resigns immediately after first being advised that the Directorship, the interlock, is being challenged.

We also have in this case, for the first time, opportunity for this Commission, as well as for any Court, to rule upon the legality which was left open in the W. T. Grant case, and that is whether or not Section 8 is applicable as against the corporation, as distinguished from the Directors themselves.

Unlike nearly every other case that comes before this Body, we are not dealing with some practice that is continuing. We are not dealing with some merger which needs to be undone, or some pricing practice that needs to be stopped. The offending practice here has long since been ended.

Now, one may well ask why SCM has gone to all of the bother? Why did it not take a Consent Order, as did the other respondent, KRAFTCO?

Of course, it is for that very practical reason that cases such as this never reach the full Commission for hearing.

SCM felt that the staff's rigid policy of insisting upon a prospective Consent Order or prospective Order in all cases, without regard to the individual circumstances of that case, is wrong.

Furthermore, SCM wanted this Commission to rule upon

that outstanding legal question left open in the W. T. Grant case. The only way that we could bring these matters before this Commission was to do what we did, and that is defend the action before the Administrative Law Judge.

Now in order to facilitate getting this case before you, we did all we could to expedite the case. We did not insist upon witnesses. We voluntarily made documents and information available. We agreed to whatever we were asked with respect to sales of Kraftco and we stipulated to the entire record in order that we could get before this Commission these important issues which we think have never been resolved.

Now, I plan to discuss three points. First, is there a basis in this record for prospective injunctive type relief against SCM?

The second question is: Whether or not, as a legal matter under Section 8, a prospective Order or any Order can be entered?

Finally, assuming that the Commission disagrees with our argument and some Order is required against SCM, should it receive a more burdensome, a more wide-sweeping Order than was entered against the correspondent Kraftco, because, as we submitted, the only difference between the two situations is that SCM has sought to bring these matters before the Commission for ruling.

CHAIRMAN COLLIER: Let me interject at this point

for the benefit of Counsel on both sides, that I have a note that the Commission yesterday accepted a Consent Order in the IBM matter referred to, I believe, in the briefs. That Order will be made available to the parties, both sides, and you will have 15 days to make further argument in light of that Order, if you choose to do so.

The Secretary will provide you with copies of that in the very near future, and you will have 15 days from that time to comment on it if you choose to do so.

MR. WILLIS: Thank you very much.

Turning to the first question I indicated I would like to discuss, that is whether or not there should be on the basis of this record prospective injunctive relief against SCM. The Commission first announced its challenge to Mr. Bond's interlocking directorship on July 21, 1975. There has been no prior discussion with Mr. Bond by any regulatory body or discussion with SCM concerning this matter. He submitted his resignation the following week, a matter of days after the Commission first announced its challenge.

In short, the first expression by the Commission that his directorships were subject to attack resulted in his almost immediate resignation.

Now, the question then is not whether or not he can continue to sit on those two Boards. He is not sitting on those Boards and that is not the question. He has taken a

form of Consent Order and has resigned. SCM, as the Commission knows, has given assurances that it will not elect Mr. Bond as a Director of SCM or of any other company while he is on the Board of Kraftco or of any other company which competes or even might compete with SCM. Therefore, compliance with Section 8 is really not the question here. But we are strongly in favor of that as the Commission is.

But we must start with the W. T. Grant case, which is the only Supreme Court case in this field, to consider the basic question, and that is, "Should there be perpetual injunctive relief against SCM."

One point that is abundantly clear from the SCM case, rather the W. T. Grant case, is that the imposition of injunctive relief is not automatic, that is, the mere finding of a violation or of an interlock is not, according to that Opinion, it does not result in immediate automatic, without question injunctive relief.

The "knee jerk" approach, which I submit the staff is arguing here, is just not supported by the W. T. Grant decision.

What does that case tell us? It says that the moving party in a Section 8 case, in order to get injunctive relief, must show there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive.

So this case comes down to the question: Is there in fact, is there something in this record which shows that there is a cognizable danger of recurrent violation on behalf of SCM?

Now the Supreme Court said we were to look at the bona fines of the parties, the effectiveness of the discontinuance, the character of privileges.

In the W. T. Grant case where the District Court did not grant injunctive relief, and the Supreme Court affirmed, there had been three separate interlocks. The Respondent there resisted for five years before proceedings were brought and denied the legality of the proceeding, all of which factors the District Court found were not sufficient to justify long-term relief.

Of course, we have nothing like that here. We start in this case with the Complaint, which alleges a violation of Section 8, but it does not contain an allegation that there is any threat of continued relation. When we first came before Administrative Judge Needelman, he called to the staff's attention they had not alleged, as the W. T. Grant case suggested, that there be an allegation of continued or threatened recurring violation.

It seems to me it was very likely the staff may try to amend in order to cover that point. But they did not and I submit the reason they did not is there really are no facts

which show that this company, SCM, is likely, is disposed to violate Section 8 of the Clayton Act.

We have here in the 50-year history of that company one such violation followed within days by resignation.

Apart from the Complaint, the record itself does not contain facts which would fall within the standard set for in the W. T. Grant case. We have everything in the W. T. Grant case on each issue, on each factor, that the case here is far more meritorious for the lack of any prospective relief against SCM because it is not questioned that SCM has never been involved in a Section 8 problem before. There is no pattern of misconduct.

We are talking about something far less than a flagrant violation. SCM, which is essentially a business machine company, Kraft, which is essentially in the food business, and SCM does have a division which sells some products which compete with the products of Kraftco. But the nature of the two companies are such that such overlap does not appear readily on its face. There is nothing in the record to suggest there was a knowing or deliberate violation of the law by anyone here.

The immediate voluntary resignation is a matter of record. Staff Counsel point out: Well, it was Bond who resigned and SCM did not do anything. Well, of course, when you think about that, there was nothing really SCM could do

at that point. Bond had resigned and it could accept his resignation, which they did. If Bond had refused to resign, all that could have been done was convene a special meeting of stockholders to oust him as a Director. The point is that within days he did resign and everything that should be done to comply with Section 8 had been done.

We have also given the Commission assurances. Now, obviously when one is preparing assurances to give the Commission, it is difficult to know exactly what language we should use or what would be required under the circumstances.

What was done here was to give assurances which almost track the form of Consent Order that was accepted by the Commission with respect to Bond himself. The breadth of the assurances are coequal to the breadth of the Order accepted by Mr. Bond.

What I am suggesting is in a case under these circumstances there is no need, no public need, to impose a future Order against SCM. This does not mean, I submit that there is any dilution in the enforcement of Section 8. If I thought that would result from that I am sure this Commission would reject it out of hand, and I would not have the audacity to suggest it. But there is really nothing to indicate that Section 8 is being violated in large numbers throughout the country.

The enforcement policy that you announced at the

beginning that this Commission has followed, and that the Department of Justice has followed, has worked. The number of violations in this field are not great. The informal approach, the approach where a problem such as this arises, and for the first time by the company and the Director has been permitted to resign, I submit has effectively, more so than any amount of litigation, brought about the strict enforcement of Section 8.

Now, what am I saying? Do I say there should never be an Order in the Section 8 cases? No, I am not saying that. What I am saying is that we look at each case. Is this the first time the company was ever involved in a matter such as th.? How flagrant was the violation? Was it stopped immediately upon the challenge by the regulatory agency? Has it been given any prior warnings? Have there been any discussions with respect to the matter which were ignored? As we know, in the W.T. Grant case they went for five years trying to get the man off the Board before he resigned.

Finally, another factor I think is this: Has there been anticompetitive conduct that resulted from the interlock? Of course in this case there is neither any allegation or any evidence of that.

The important thing is that the Section 8 rule should be enforced and enforced rigidly. I submit, the procedure which I am urging here, which this case for the first

time gives the Commission an opportunity to consider, is one that is in the public interest.

When this action itself was filed a little over a year ago, Commissioner Thompson noted, and this was set forth in the press release, that he thought the results contemplated, all could have been achieved informally by negotiating a settlement. He obviously believed a voluntary resignation could likely be obtained once the individual knew that he was under investigation.

And I submit he was right. There is no Director who will take on this Commission. You may find a company that will fight over a pricing practice or they may try to justify an advertising practice, but a simple word from this Commission or the Department of Justice will bring about quickly, effectively and, I submit, very inexpensively, complete 100 percent compliance with Section 8 of the Clayton Act.

CHAIRMAN COLLIER: Would you propose that those conditions or any of them you mentioned be elements of required proof in a Section 8 case?

MR. WILLIS: It would not be at all an element in the proof of the violation. I think in this case, whether civil or criminal, you are talking about, first, the proof that there is a violation of the law, and secondly, proof with respect to what kind of remedy would be appropriate.

I think over the years the Commission has on various occasions found instances where they found the violation, but thought no prospective relief was appropriate.

COMMISSIONER COLLIER: What position does that put someone else in who is not party to this proceeding in terms of his law enforcement awareness? What kind of position does it put him in when he knows if he can meet those conditions there is that much difference between being found not in violation and not having an Order issued? What kind of deterrent, if any, does it supply to someone contemplating an action that could violate, I don't want to paraphrase your argument, but you might be suggesting technical requirements of Section 8 without incurring any liability at all? Would you propose some other form of liability? What price does a person pay for violating Section 8 under those circumstances?

MR. WILLIS: I think, first, but I don't want the Commission to think I think Section 8 is merely technical. It is not. Congress designed that statute, it is not directed at an unfair practice or an anticompetitive practice, but it is a structural problem that Congress has said they will not permit. So I am not at all taking Section 8 lightly.

What I am saying is there are various ways to bring about enforcement of Section 8. The policy over the past year has, for the most part, been one, and the Department of Justice in fact announced the policy some years ago, that where a

challenge is made informally and the Director resigns that Section 8 has been fully complied with, and that barring something extraordinary, there need be no permanent lifetime relief against the corporation.

COMMISSIONER DIXON: Could you say under that policy the parties would be given more than one bite at the cherry with this kind of violation?

MR. WILLIS: I think what you said, Commissioner Dixon, is a legitimate point. I am not arguing that you are entitled to one bite. I think the fact you had no bites before is a factor. But I think that is just one of the factors.

For example, if you found that this was just a deliberate violation of the law, if you found that --

CHAIRMAN COLLIER: Wouldn't that require then proof of deliberateness or proof of non candor in something? Wouldn't it in effect change the statute?

MR. WILLIS: No, I don't think it would. I think the statute merely proscribes the offending conduct. It does not tell either the Court or the Commission the nature of the relief that should be granted. For that it seems to me we look at the W. T. Grant case which says that there must be a showing that there is a cognizable danger of recurrent violation.

What I am urging --

CHAIRMAN COLLIER: What consequence follows for a

violation not including one of your additional factors, what consequence would you propose as a matter of policy for a violator who had not, in addition, met one of your other conditions?

MR. WILLIS: We are assuming he voluntarily resigned?

CHAIRMAN COLLIER: Yes.

MR. WILLIS: In a case such as this where there has not been a prior problem, where there has not been an indication that it was deliberate or intentional, where it has not been a flagrant type of violation and there have been no efforts by the regulatory body to get a voluntary resignation, I think this Commission or the District Court or if it were a Department of Justice case, it could say, under the circumstances, as in the W. T. Grant case, under the circumstances "There is no need for perpetual injunctive relief against either the individual or the corporation."

CHAIRMAN COLLIER: Why doesn't it create an incentive for a fellow to do that, because you have not yet indicated what sanction, if any, would be applied to a person who violated the law under those circumstances?

MR. WILLIS: Of course, initial sanction is if he failed to resign he can be forced to resign.

COMMISSIONER DIXON: But this Complaint didn't charge the individual, but the corporation.

MR. WILLIS: Originally all three were together,

Commissioner, and, as you know, the other two took Consent Orders.

What I am saying is that this policy, I think, has for the most part worked over the past 60 years and with the policy where a voluntary resignation under appropriate circumstances did not result in an Order.

COMMISSIONER DIXON: When conglomerates begin to broaden their base it poses some pretty good soul searching of themselves as they broaden their base where the present Board members are now in jeopardy under Section 8.

MR. WILLIS: Yes. I think as a company diversifies they have to be doubly careful to avoid this kind of problem.

COMMISSIONER DIXON: Don't you think it is logical that they should be in jeopardy of paying penalties if they don't do that and repeat?

MR. WILLIS: If they repeat, and I am assuming --

COMMISSIONER DIXON: If they repeat -- well, you first argued to us that this statute only applies to individuals and not corporations. You have made that argument.

MR. WILLIS: I will come to that.

COMMISSIONER DIXON: You will come to that. Let's follow the argument. Therefore, as soon as an individual takes himself off, and closes the case, which in the past the Commission has done, and I remember cases back in the 50's that this was done as a matter of routine. But since early

1972, after the Commission had been criticized both inside and outside and in hearings up on the Hill for not devising more effective Orders, -- well, here is a proposed Order in this Complaint that is before the Hearing Examiner which has a bite in it. It has responsibility of the corporation as they go on down the road beyond this man that has already resigned. So that if they don't carry them out they will be subject to penalties. They will be subject to nothing if we follow your argument.

You just said why would we think they ever repeated again, because there have been so few. Are you sure there have been so few or are you sure we are not being damn lax here in not finding more? Can you sustain the position you take?

MR. WILLIS: I obviously cannot give a statistical figure and, of course, I think the Commission would be aware of the Section 8 violations if they were running rampant.

The point is that the Supreme Court in the W. T. Grant case has set forth the standard that must be applied. I think unless we look for evidence which will show that there is some cognizable danger of recurrent violation, something more than mere possibility, that the Supreme Court has taught us that no prospective Order is required. I think by and large that has worked.

I, again, don't know the statistics.

COMMISSIONER DIXON: You have suggested, at least to me, if you wish to sustain such an order the Government should have to sustain that burden of some kind of proof th illustrates the necessity and you should not have to sustain the burden.

MR. WILLIS: I think the Supreme Court said it is the moving party who sustains the burden, but I don't think we have a moving party that sustained the burden of proof in this case today because I don't think there is any evidence that would support any kind of Order other than the mere fact there had been this one violation, and I think the Supreme Court has said that that is not enough.

Let me, if I may, turn very briefly to the other two points I wanted to cover. My second point is the legal question which Commissioner Dixon had mentioned earlier. That is, whether or not Section 8 itself has a legal basis for relief against the corporation? Our argument with respect to that is, or relies on, the language of Section 8 itself.

COMMISSIONER DIXON: Didn't you read Section 11 which is the empowering Section?

MR. WILLIS: I did indeed.

COMMISSIONER DIXON: Did it say anything about an individual there?

MR. WILLIS: Section 11 is a procedural section and

starts out with the language, "Whenever the Commission shall have reason to believe that any person is violating or has violated any of the provisions of Section 8, it shall issue and serve".

Now, what Section 11 tells us is that you first must find a violation of Section 8 by some person. Now, of course, under Section 8 a corporation can't be a person and that this must only be directed at individual Directors.

COMMISSIONER DIXON: It says it shall make a report in writing and shall issue and cause to be served on such person an Order requiring such person to rid itself of the Directors chosen contrary to the provision.

One can't read that language without envisioning the Director saying "I like my job and want to stay on." It would order the corporation to rid itself of that person.

MR. WILLIS: Let me make three points in answer to that, Commissioner.

In the first place, I again rely upon the language of Section cc, beginning language which requires a finding of violation under Section 8 first.

Secondly, I point out that the "rid itself" language has its genesis in the power originally given to the Federal Reserve Board to require banks to rid themselves of Directors when the Federal Reserve Board, well, the Act was changed in 1935, that language did not get removed from

Section 11.

But I am arguing that Section 11 can't create in Section 8 something that is not there.

Finally, if you say that the "rid itself" language does mean that the status has applicability to corporations, then there is again no Director to be rid of here. We have a situation where the Director has long since rid himself of the corporation.

COMMISSIONER DIXON: You don't think Section 5 would apply to it?

MR. WILLIS: Section 5, the Administrative Law Judge found first Section 8, and then said that means there is automatically a violation of Section 5. So far as he was concerned his finding a violation on Section 5 had rested upon his prior violation of Section 8.

Now, insofar as 5 is concerned, if there had been some anticompetitive conduct, some evil, someone who had been hurt by this practice, then it seems to me you may find a Section 5 problem, but we are talking about a very special kind of violation under Section 8.

COMMISSIONER DIXON: You are dealing in Section 8 with a statute which says: if you have satisfied two or three of the technical things about size and what have you, and are competitors, that if you can think of anything that would violate the antitrust laws, then you violated Section 8.

It is not very hard to imagine a Director sitting on two Boards in competition could hinder the competition. All you have to do is just imagine it and he would be in trouble. That is the kind of statute we are dealing with.

When Congress passed the statute, as I read the history, they believed somewhere in this gigantic country there were enough people that were good enough to run corporations without having to duplicate competitors.

MR. WILLIS: Section 8 clearly makes that a violation. Congress spelled it out.

COMMISSIONER DIXON: They didn't say you had to prove any kind of misconduct. They said, if you can imagine any kind of misconduct, not prove it, but imagine it, and if you can think of any way it could end competition, it violates Section 8.

MR. WILLIS: It does not need to prove an injury under Section 8.

COMMISSIONER DIXON: But would you say we have to do it in order to have this relief?

MR. WILLIS: No. What I say is we talk about Section 5 and if we are looking at Section 5 as a basis for this, then we have to look for something more than mere structure.

What I am saying on Section 8 is, I am not contesting here the fact that Mr. Bond violated Section 8. I think

the only question is: what kind of prospective relief is required as against SCM Corporation?

My argument, which we have set forth in our brief on that point, and I won't repeat, is that in essence that Section 8 on its face does not apply to corporations and that Section 11 is essentially procedural and should not be used to fill in that gap.

But let me turn just in the few minutes I have left to the final point which I want to make. That is based, as I said, on the assumption that the Commission concludes that we are wrong with respect to the first two points and then that some kind of order should be entered against SCM in this case. What I am submitting is that under such circumstances SCM ought not to be penalized because I brought the matter before this Commission in this case.

The points that we have made we have made in the best of faith. The legal question that we have just been discussing is one that the Supreme Court said was open and it would not decide the W. T. Grant case, and it has not yet been decided in this case. The question or extent of prospective relief is not something that this Commission has ever had argued to it in a Section 8 case.

The staff has accepted, the Administrative Law Judge has accepted, and this Commission has accepted orders from both Bond and from Kraftco in this case.

The Order which this Administrative Law Judge imposed upon us is far broader and far more sweeping than the Commission found was in the public interest insofar as Kraftco is concerned.

CHAIRMAN COLLIER: At pages 29 and 30 of your brief you list five major differences. I would like to know with respect to those differences if you can assist us in your brief, what, if any, prejudice you feel SCM suffers as a result of those differences?

MR. WILLIS: I think in the first place the breadth of the Order, the fact that we are prohibited from having a Director or apart from -- well SCM is prohibited from having a Director who served as Director of Kraftco or any other corporation which competes with SCM obviously pus SCM to greater jeopardy in inadvertence and mistake than Kraftco was being put to.

CHAIRMAN COLLIER: In what respect does it differ from the Kraftco Order which also has a bar on a certain interlocks in addition to the Kraftco-SCM interlock by virtue of the certification and reporting procedures contained in the Kraftco Order?

MR. WILLIS: When we get into that form of the Order it is even broader as far as SCM is concerned. We have to, if a new Director goes on the Board get a description of each product or service produced or sold by the corporation.

It is pointed out to me if we were to get someone from Westinghouse Electric it may be 8,000 products and services that may be caught up by that. Kraftco is note required to obtain that kind of statement. Insofar as the time period involved in some of the obligations with respect to SCM, we are talking about perpetual, and insofar as Kraftco it is limited to several years.

What my point is --

CHAIRMAN COLLIER: How does that prejudice SCM. You are comparing the situation I take it of SCM to the situation of Kraftco?

MR. WILLIS: Yes, because they are both in the same case and involved with the same interlock.

CHAIRMAN COLLIER: In what way is SCM prejudiced by these requirements?

MR. WILLIS: To the extent it has imposed upon it the burden, the limitations that have not been imposed upon Kraftco.

As I say, I am picking just the Kraftco Order for comparison. If one looked at other Orders there may be greater differences.

As far as Bond is concerned, of course his is the most limited of all.

CHAIRMAN COLLIER: Would you argue in any interlock case that the Kraftco Order must be applied?

MR. WILLIS: No. I am saying in this case the fact that the Kraftco Order has been greatly expanded and widened in its burden and in its sweep insofar as SCM is concerned, it is unjustified on the record, at least.

CHAIRMAN COLLIER: Do you see any difference that would be allowable?

MR. WILLIS: I think the difference is it did not impose differing burdens which might be peculiar to the particular circumstances of SCM as contrary to Kraftco.

CHAIRMAN COLLIER: Can you cite any case of "a most favored nation" treatment of some respondent involved in this kind of transaction?

MR. WILLIS: I cannot. This is not something so far as I know which has been litigated before this Commission. What I am saying is, and I think that the record here is abundantly clear, that the evidence justifying relief against Kraftco is no greater than the evidence justifying relief against SCM.

COMMISSIONER DIXON: Merely because they consented and you didn't.

CHAIRMAN COLLIER: Is that a justification, to consent away an argument or a position in true negotiations? Is there ever a basis for a difference?

MR. WILLIS: There is under certain circumstances.

CHAIRMAN COLLIER: Would you enumerate them?

MR. WILLIS: When you are dealing with the public, when you are dealing with this Commission, where this Commission is charged with carrying out the public interest under Section 8, when it has found that such and such an Order is appropriate to the public interest as against Kraftco.

CHAIRMAN COLLIER: Kraftco had no finding of violation with regard to Kraftco at the time they signed the Order.

MR. WILLIS: There is no question about that, but I don't think this Commission and the staff --

CHAIRMAN COLLIER: Well, they raised the question you raised and preserved with regard to liability of the corporation for example.

MR. WILLIS: Yes. But the only way I submit that the difference between our Order and the Order that this Commission gave Kraftco can be justified is if we are being punished and penalized because we brought the point here in this room. There is nothing in the record to justify any difference other than that. And of course the Commission's Counsel do talk about the fact that Kraftco cooperated and saved --

CHAIRMAN COLLIER: If it were determined you violated the law and, of course, it was determined they had not, it had not been determined they had under the Consent Order, wouldn't that be a difference?

MR. WILLIS: I don't think it is a case of this simplicity. I don't believe Staff Counsel will tell you that they were, insofar as Mr. Bond was concerned certainly, that certainly they had any doubt that when the facts were all known there was an interlock here.

COMMISSIONER DIXON: Under Section 5 of the Act it provides that on a change of facts or law in a public interest matter it can be heard over and be reconsidered, and a Consent case, if down the road it should come before the Commission or the staff, it was possible there was a relation similar to what was consented to but not a violation of the law, the Commission might very well ask to reopen the matter and then to consider it over again, and then on the record the Commission would have to decide whether there was a violation. The same thing is open to you as Counsel for SCM if down the road you have some change of facts or law circumstances which you wish to present to the Commission to reconsider for changing the Order, the severity of it, or what it is, it is open to a Consent Decree.

MR. WILLIS: I agree, Commissioner, but I submit both we and Kraftco should start from the same point unless there is some reason to throw the book at SCM and, as I say, the only difference between the Order, or the only difference between the Order which the Administrative Law Judge accepted for Kraftco and the one he recommended for SCM is the fact

that we, and as I said at the outset, we tried to expedite this and first tried to bring the matter up by summary determination so we could get the question resolved quickly -- when he was reluctant to do that, then we stipulated. It seems to me the points we are raising are legitimate points that this Commission ought to rule upon, and that if we are wrong, if the Commission finds that the points we made are without substance, certainly in this case there is no basis for saying, "we will give a stronger Order against SCM than we did against Kraftco in the same proceeding."

Now, I think I have taken up too much time.

CHAIRMAN COLLIER: Mr. Hechtkopf.

MR. HECHTKOPF: May it please the Commission, at the outset we would like to note that SCM and Kraftco in this instance did start out from the same position. The Order sought against Kraftco initially in this matter was the same Order that was finally Ordered by the Administrative Law Judge against the SCM Corporation. It was only through the process of negotiation and the give and take inherent in the negotiated settlement that Kraftco won concessions and was able to come up with what SCM characterizes as a less stringent Order.

Along that line, we would point out the only real difference between the SCM Order and Kraftco Order is the length of time involved and the fact that the Kraftco Order

is limited to principal products of the Kraftco Corporation.

CHAIRMAN COLLIER: There is also a million dollar floor similar to the statute, Section 8, with regard to the type of competition which the interlock Director could be implicated before liability, of course. As I read the Order of the Administrative Law Judge, there is no one million dollar floor and would you care to comment why that provision is justifiable?

MR. HECHTKOPT: The statute provides that one or the other of the corporations has to have at least one million dollars woth of assets, capital surplus, and so on. In this case SCM certainly meets that requirement. Furthermore, the Order would properly be interpreted so as not to go beyond what the statute requires. In fact, in this case all that the Order against SCM requires is that SCM obeys Section 8. It goes no further than that, and we fail to see how it can be considered a penalty. How they can consider themselves to have been penalized when all they have been told to do is abice by the law.

CHAIRMAN COLLIER: So you would read into the Administrative Law Judge's Order any limitation that adheres in the statute?

MR. HECHTKOPF: Certainly any limitation in the statute.

CHAIRMAN COLLIER: Even though the Order is always

granted under Section 5 and not 8?

MR. HECHTKOPF: That is correct. Our review of the Order is that it is grounded principally in Section 8.

COMMISSIONER DIXON: Is it a matter of policy for anybody to try to get a Consent Order issues if you think it would be less than the Commission will insist upon if he fights it? That is what he said.

MR. HECHTKOPF: We believe that their position is really not in accord with public policy and public interest. There is a very definit public policy not only in assuring that corporations abide by Section 8, but in addition there is the public policy of avoiding litigation. Now, the rule SCM argues would tend to foster litigation rather than further the policy of avoiding litigation. Furthermore, there is, of course, in any Order that we obtain through the Consent proceeding, in those instances the Order which we obtain is certainly a message to the business community that the Commission is going to continue to pursue these violations and it has the necessary deterrent effect.

Yes, the Commission should take action as it has done in this case which tends to encourage the settlement of cases.

CHAIRMAN COLLIER: Is there a procedure inherent of processes by which SCM could get the kind of prior approval that Kraftco could obtain with regard to a new prospective

Director?

MR. HECHTKOPF: Yes. Rule 61(D) provides that anyone who is subject to an Order may request the Commission's view as to whether a particular course of conduct or action would be in violation of that Order.

CHAIRMAN COLLIER: Is there any substantive difference between the two approaches, the one that Kraftco took and the one SCM might take under the Order?

MR. HECHTKOPF: We don't. Basically the rules concerning Consent Orders in the Commission rules is the same.

CHAIRMAN COLLIER: What is it, if in a period of four years or five years they don't have to ask you, that is Kraftco does not have to ask you, but SCM would --

MR. HECHTKOPF: Again, this is just the result of Kraftco's negotiations, the fact that Kraftco was able to win a concession. This is the thing we have to stress. That in this case we do not have a situation where an Order, which we started out with, was the Order that Kraftco got and SCM was told, Now that you failed to accept an Order we are going to add on all of these additional onerous provisions."

In fact, the provisions are not onerous, but simply require SCM to do what Section 8 requires.

CHAIRMAN COLLIER: Why does the public interest require SCM Directors to report in perpetuity the products

of other companies on which they may be sitting as Directors?

MR. HECHTKOPF: The purpose for that is in large measure a benefit to the SCM Corporation. SCM has the obligation of complying with Section 8. The mechanism for this is designed to insure the violations will not occur. The Administrative Law Judge concluded the very nature of the offense involving $341 million worth of competition over a period of about 8 years that the interlock was in existence, demonstrates that SCM either failed to care about Section 8 or certainly did not have adequate procedures.

CHAIRMAN COLLIER: Why didn't the comprehensive prohibition on further violation serve as the same deterrent? What additional deterrent is served by reports from the individual Director?

MR. HECHTKOPF: Again, the principle there is this is an aid in, aid to SCM in a sense as well as the public. It increases or it decreased the likelihood of SCM inadvertently putting on its Board of Directors --

CHAIRMAN COLLIER: Unlike the other, and I don't want to get into too much of a comparison, but in the other situation you don't have the same coverage with regard to the prohibition as I understand the other Order? You have a prohibition on the interlock that was involved in the particular factual situation and then you have a Taylor's prohibition with regard to the other potential interlock.

In this case it is absolute. I was wondering why, in this case, after the tenth year of reporting, these reports maybe 50 years from now have to be generated by Directors to SCM Corporation as I read the Order.

MR. HECHTKOPF: Again, as we say, we find that that provision would be of service both to the public and to the SCM Corporation.

CHAIRMAN COLLIER: These are not public, are they? These reports that these Directors will be providing of SCM?

MR. HECHTKOPF: No. But the public interest is served because they tend to establish a mechanism.

COMMISSIONER DIXON: Why would the public interest be served for the Commission not to adopt a Consent Order except with Kraftco? Why wouldn't it?

MR. HECHTKOPF: If that were to occur then we would again have, we would have damaged the public interest in seeing to it that litigation is avoided, at least in one aspect, plus taking that position would mean that any time that the staff was embarking on a new line of Order or new series of cases in all Consent settlements we would have to strive to get the maximum Order possible that we considered to be required by the public interest.

COMMISSIONER DIXON: Do you recommend the Commission accept the Kraftco type Order?

You were satisfied it was a good remedy, didn't you,

when you represented it? Did it have viciousness which you didn't tell us about, if it was vicious?

MR. HECHTKOPF: Again it is a good and adequate Order.

COMMISSIONER DIXON: If it is a good and adequate Order why isn't this a good and adequate Order?

MR. HECHTKOPF: Again, it is a question of balancing the two public interests involved. One is the public interest in Section 8 and the other is not --

COMMISSIONER DIXON: Suppose it got down to what we were faced with was: You enforce us to try this and we are going to go whole hog and want this. If you sign this right now, it is all right and we will argue that the Commission ought to take it.

In other words, this is putting you in the position of having a hammer in your hand and saying, either take this or I will hit you with the hammer."

MR. HECHTKOPF: Again --

COMMISSIONER DIXON: It may be a good part, but if the Review Court looks at it and says, "That is discriminatory as hell," it does not make sense for law enforcement to proceed along that way. They ought to have an objective and if they don't do it you litigate it.

MR. HECHTKOPF: Again, what happens is you lose the benefit of the settlement Orders. It is that kind of situation

so therefore the Commission's resources are spent.

COMMISSIONER DIXON: From where you are, I appreciate what you are saying, but you have not answered my question. You have not helped me out any from where I sit now.

MR. HECHTKOPF: Again, our position is that the Kraftco Order -- well, the purpose of entering the Order is to serve the public interest.

COMMISSIONER DIXON: Did you say the Kraftco Order served the public interest?

MR. HECHTKOPF: When taken in conjunction with --

COMMISSIONER DIXON: It would be silly if it didn't -- if we had accepted an order they would wash their hands of the whole affair. We agree with Kraftco for this and we settled on that basis. I have seen some mighty funny law-suits in my day settled on a basis like that, that are quite questionable.

MR. HECKTKOPF: Again, as we say, we feel that the public interest is served by the Order in total. The total public interest, that is, because of the fact that that Order saved the taxpayers and the Commission the resources involved in litigating.

COMMISSIONER DIXON: Well, I understand and Counsel obviously says, "we chose to litigate because we didn't think, we didn't even think that the consent that was entered into should have been entered into possibly by them," and he

assigned the other points, these "time" things, and they said, "We want to fight", and so chose to fight.

MR. HECHTKOPF: Again, as I pointed out at the outset, the Order finally entered against SCM by the Administrative Order is the same Order we presented to Kraftco.

COMMISSIONER DIXON: You presented it to them at the same time and one of them took it and signed up and the other one says, "I am not going to take it, I am going to resist all the way, get ready."

Now, you are here. The Hearing Judge accepted a tougher Order than he referred up in the Kraftco.

MR. HECHTKOPF: But the Order that Kraftco started with its negotiating was the same Order that SMC is now complaining of.

COMMISSIONER DIXON: If I were to say maybe Kraftco ought to be here, too, maybe you should not have agreed with Kraftco. Maybe we should try you a while and ask you why did you agree with Kraftco? Is it because you didn't want to try a case against Kraftco?

MR. HECHTKOPF: Basically, the benefit that was achieved by the fact an order could be entered promptly.

COMMISSIONER DIXON: It was a good enough Order to suit you?

MR. HECHTKOPF: It was good enough under those circumstances, however, the Order against SCM is the Order

that the staff feels is the minimum necessary in the case of a litigant in a Section 8 matter.

COMMISSIONER DIXON: The Courts long recognized that the Commission could write 50 straight Orders on the same similar identical facts and the Orders could all differ and if we had a rational reason for them I think the Court would put its stamp of approval on it.

Let me go at it differently. Why is this Order better than the Kraftco Order?

MR. HECHTKOPF: It is better than the Kraftco Order because this Order -- well, it is better than the Kraftco Order in the sense that it is better from a litigative standpoint.

CHAIRMAN COLLIER: Why is it better from the public's standpoint? Why does it better protect the public than the Kraftco Order?

MR. HECHTKOPF: It really balances out, that this Order is an Order which was entered after litigation. The Kraftco Order is an Order where Kraftco receives what you might call a bonus.

CHAIRMAN COLLIER: I understand the process. Why does this Order provide more protection to the public, if it does, than the Kraftco Order does?

MR. HECHTKOPF: Certainly it provides more protection to the public because it goes on for a longer period and

it applies to all product lines and it insures that Section 8 will be carried out in full. Therefore, this is a good Order and an Order eminently reasonable under the circumstances in this case.

COMMISSIONER DIXON: You could say in the next breath, possibly, you should move the Commission to reopen the other one, the Kraftco case, and go back into this same type of Order again, if you think this is such a good Order.

MR. HECHTKOPF: If the Commission desires to do it, we certainly could not object to it.

COMMISSIONER DIXON: You are the one who set it up. The Commission put it in your hands as Counsel, and you decided this satisfies you, to settle with it, and you sent it up to us and we recommended you take it. It might be possible to do that and start it all over again.

My next question is do you have a way of estimating for us how the additional benefits of the public are worth those additional tax dollars we might spend by expanding the Order to make it as broad as this Order? There are no free lunches, and it would cost money to open that all up, to get that additional consumer benefit. Can you give us some idea how much benefit would be involved comparing the difference between these two Orders?

MR. HECHTKOPF: That is what actually answers the question.

CHAIRMAN COLLIER: What is the question?

MR. HECHTKOPF: The question answers itself, because, as we have said, what our position is is that Kraftco did enhance the public interest by accepting an Order. Now, another factor that can be taken into consideration here is Kraftco by entering into the Order has demonstrated a willingness to abide by Section 8. Whether it had the issue litigated or not, it had said, by entering into the Order, it is going to abide by Section 8. SCM has not.

COMMISSIONER DIXON: What bothers me is that as a member of the staff and the Bureau's position in this matter you put the Commission to despair because you settled the Kraftco on the same settled facts for less than you were able to get through a Hearing Judge from another party with identical facts which is now up here on appeal.

MR. HECHTKOPF: Again, when Kraftco entered into its Order we had no way of knowing what kind of Order the Administrative Law Judge was likely to accept. Therefore, again there is the benefit of knowing that we have an Order for sure. It was a sure thing, which we don't have in the case of SCM when it chooses to litigate. Therefore, if we are sure that the public interest is going to be served in that case, we know there will be an Order, and we don't in the case of --

CHAIRMAN COLLIER: As I read the Kraftco case, there

was a provision which provided a type of exemption for subsidiaries and controlled corporation, isn't that correct?

MR. HECHTKOPF: Yes.

CHAIRMAN COLLIER: There is no such exemption in this Order, and why does it make sense to prohibit Directors from sitting on the Boards of subsidiaries of SCM?

MR. HECHTKOPF: This is a matter that perhaps was not fully considered and it could be worked out. However, again --

CHAIRMAN COLLIER: Would you object to revising the Order providing an exemption for that?

MR. HECHTKOPF: Actually, we believe this Order again is what is necessary in the public interest, and even in the case of subsidiaries in competition with each other, perhaps it is better to have separation of Directors.

CHAIRMAN COLLIER: What difference does it make if they are separate?

MR. HECHTKOPF: Well, there are cases which have held you can't have a conspiracy among corporations which are subsidiaries one corporation, or between the parent and subsidiaries. So based on these cases we would say if this Order does in fact reach interlocks against SCM and subsidiaries, that it would be proper under Section 8.

CHAIRMAN COLLIER: Have you authority for that proposition under Section 8?

MR. HECHTKOPF: The only authority is if the firms are competitors so that agreement between them --

CHAIRMAN DIXON: Except your earlier argument and the argument of all defenses that are available under Section 8 might be available under --

MR. HECHTKOPF: That is right. If this were available under Section 8, if a subsidiary relationship would be available under Section 8 we believe the Order would be applied that way.

COMMISSIONER CLANTON: I would like to pursue a further point before we get off of the Consent Order versus this litigation here.

I take it that what you are saying is that the only difference as a practical matter between the Order obtained in the Kraftco case and this matter is the fact of the negotiating process and we have a give and take, but there is not, as a practical matter, any distinction between the activities and the bona fides of the two companies that justify a difference, or am I wrong? Is there a difference other than the fact that Kraftco accepted it?

MR. HECHTKOPF: Because of the nature of the record that one establishes in a Section 8 case, it is really difficult to look into the bona fides. We have a statute so that the only real issue is --

CHAIRMAN COLLIER: It has nothing to do with the

activities. It is really the negotiating process, by nature you have to give up something?

MR. HECHTKOPF: Yes, the negotiating process, and the fact there is some indication on the part of Kraftco by entering into a settlement, by waiving its rights to litigate the matter, that Kraftco is willing to comply with Section 8, something that we don't find in the case of SCM by virtue of their argument that Section 8 is not applicable.

COMMISSIONER DIXON: You are not thinking of penalties? Litigating?

MR. HECHTKOPF: No, complying with Section 8, first of all, is no penalty. It is certainly not penal. All this Order does is require that they comply with Section 8 --

COMMISSIONER DIXON: It is not penalizing, perhaps if one's activities, the reporting burden is going on?

MR. HECHTKOPF: Again, the reporting burden should be of benefit to SCM because it helps to avoid future violations of the Act that are subject to civil penalties. So they should look on it as a benefit as well as a burden in the case.

SCM in arguing that relief should not be granted them at all, cited W. T. Grant and stressed the language in the W. T. Grant case that the moving party must satisfy the Judge that an Order is necessary, that there is likelihood of recurrence of a violation.

We would like to point out that nothing in that case really talks in terms of a burden of proof or anything other than the fact that the Judge has broad discretion and that th lower court Judge in that case decided there was nothing to satisfy it.

In the Concentrated Phosphates case --

COMMISSIONER DIXON: You are suggesting this punishment to him merely because he resisted. That is what he suggested in his argument. What do you have to say to that?

MR. HECHTKOPF: Again, I think it is our position this is not a punishment. It is simply a fact that Kraftco was the one --

COMMISSIONER DIXON: The whole thing you recommended that we accept and the Consent you worked out to a party which was party to the same set of facts, it was the other corporation which was interlocked here.

MR. HECHTKOPF: This is correct. Nevertheless, it is not punishment. The Order goes no further than what the law requires and if it is not punishment to abide by Section 8, it should not be viewed as punishment.

COMMISSIONER DIXON: The question is, if it applies to him, why were you willing to not take a lesser Order of the other party, merely by trying to get out of the case, if that's what it comes down to?

MR. HECHTKOPF: Yes, because it is in the public

interest.

COMMISSIONER DIXON: Because you said you had adequate relief. You answered that question one time already. You don't have to keep on answering it.

MR. HECHTKOPF: Adequate to the extent that you can't look at it in a vacuum but it is adequate to the extent that you look at the total picture from the public interest involved. That is why an Order is entered, to protect the public interest. If the order protects the public interest --

COMMISSIONER DIXON: This is a little bit different. The next Section 8 that comes before the Commission, if they should issue a Complaint, they will be locking at this case and what we dicided in the other cases, just as you two have looked at this matter. This one is two corporations that were interlocked by Mr. Bond. Mr. Bond and the other corporation took an Order willingly which you supported and they have said, "No, we are not going to take that Order. We don't think we should have any Order."

So you went to trial. When you got through you gave them part of that Order and you gave him a tougher part than you settled with the other fellow.

MR. HECHTKOPF: Again, that actually would be serving the public interest because in the future it encourages negotiations.

COMMISSIONER DIXON: We accpted that Order, I am

fully aware of that, but I am thinking about the position of fairness and the staff's position of where you put the Commission when you do things like that.

MR. HECHTKOPF: Again it is our position that this is completely lawful.

COMMISSIONER DIXON: I don't think you should have, on the same sets of facts, four or five different sets of relief. I am not sure that is a fair way of proceeding. Merely because a man says: I will tell you what, I will take this much. No more if you will take that. If you take that, sign the paper and go to the Commission and say, we think this is adequate and it takes care of the public interest.

MR. HECHTKOPF: By analogy, we might look for a moment at criminal law where people stand in greater danger --

COMMISSIONER DIXON: We are not interested in criminal law, you are talking about you ought not forever, the old theory of saying you ought to keep everybody on death row until you try the last murderer. I don't understand that.

MR. HECHTKOPF: Not so much that, but just the fact it is a well-recognized principle that different circumstances involved warrant different relief.

COMMISSIONER DIXON: You have an idea there have been a lot of sins committed by so-called prosecutors in the United States, selling the public interest down the drain

in order to make their job a little easier.

MR. HECHTKOPF: This certainly is not a case of making the job easier so much as it is saving the public the cost and expense.

COMMISSIONER DIXON: That is the question. You are trapped with the question. You said: I am satisfied with the relief in Kraftco. I am so satisfied with it I say to the Commission, "You should take it".

But that fellow didn't take it. He wanted to try it and you say, "When I get through trying him, I am going to hit him with a hammer if I can."

MR. HECHTKOPF: Right, because that Order in the total picture of what the public interest was was in the public interest.

COMMISSIONER DIXON: You are not required to charge somebody with it, you have to carry the burden of proof and prevail in order to get any relief.

MR. HECHTKOPF: Unless they settle, in which case the Government is saved the burden of carrying that burden of proof.

COMMISSIONER DIXON: You think it is perfectly justifiable in the pursuit of taking care of the public interest to take less relief from one party than a party that you have to try?

MR. HECHTKOPF: When that party is against them,

we take less relief and it provides some other public interest counterbalance benefit, yes.

COMMISSIONER DIXON: The only thing I see here, and the facts are stipulated, the only thing here is the relief that the other party was willing to take, but this party was not willing to take.

MR. HECHTKOPF: Plus the other party -- well, the party before the Commission now, however, SCM Corporation, has expressly denied that it is subject to Section 8, and it has gone so far as to say, "We can't even bolster Section 5 or bolster Section 8 with Section 5." So what --

COMMISSIONER DIXON: I understand that. He went to the next thing. He said, I think if I lose on this, I think it is unfair basically to make me be subject to an Order in perpetuity for instance and the other guy for only a limited number of years and a limited number of products.

MR. HECHTKOPF: However, again, there is still that public interest in seeing to it that the Government, or that the public gets its relief in some form, and you have to put in there the counterbalancing factor.

COMMISSIONER DIXON: Do you think this is a form of punishment?

MR. HECHTKOPF: No.

COMMISSIONER DIXON: Why don't you? The Court might review that question.

MR. HECHTKOPF: It is strictly a question of the give and take of negotiations. SCM had the same opportunity that Kraftco had. However, throughout the proceeding it refused to enter into any Consent. Now, after it has had the benefit of a full-blown trial of the issues, should it be able to go back and say, "Now that I lost, can I have the same Order as this other firm which saved all of the expense of litigation?"

We submit that it is in the public interest to enter this Order against SC, Corporation and that the public interest in the instance case will be carried through.

COMMISSIONER DIXON: Should a Government agency charged with enforcement of a statute have as an objective the type of Order it wishes and not give everything to the guy it wants to settle with and nothing to the buy it tries, is that the ultimate of fairness?

MR. HECHTKOPF: That kind of policy could conceivably be wasteful. You would eliminate all of the benefits that come from being able to enter into a Consent settlement because no litigator in his right mind would enter into a Consent Agreement if he knew all he was going to get was the maximum authorized by the law, the maximum remedy authorized. So that what you would end up with would be defeating of the public interest by granting SCM the kind of relief it now seeks. The whole purpose of a Consent Settlement would

be destroyed.

COMMISSIONER DIXON: I would think if this matter would be reviewed on what you are urging upon us, the Court would look very carefully at what we do and what reasons and rationale we would assign for following your argument. They might very well wish to criticize you for the type of Order you got on Consent. They might say, "Hell, you sold the public interest down the river, you took nothing."

MR. HECHTKOPF: But that's not true. We have an Order which, again, on a balancing test, as against Kraftco, is a good order on balance, but we cannot look at the Order in a vacuum. We have to look at it --

COMMISSIONER DIXON: You cay say it is a more stringent Order than the Order which you got on Kraftco?

MR. HECHTKOPF: Certainly.

COMMISSIONER DIXON: You realise that?

MR. HECHTKOPF: Yes, but it is not penal. It is simply Kraftco whittled the Order down and it is not a case of saying to SCM, "Look at the Order Kraftco got. Unless you consent we are going to add to that Order until we come up to this."

Actually, it was exactly the opposit situation. Kraftco took the Order down and worked it down. SCM is not prejudiced, certainly not prejudiced if that Order goes no further than what the statute requires.

Turning again to the question of the Grant case, as I started to mention, there is no mention at all of burden of proof in the Grant case. It is simply the requirement that the Judge be satisfied there is a need for relief. Grant was not overturned --numerous Commission precedents we cited stand for the proposition that the Commission has viewed abandonment or termination of violations with something that might be called disfavor insofar as granting some sort of relief as a rememdy.

Just this week the Commission handed down its decision in the Indian Arts and Crafts case. There the Commission took the position that abandonment is not enough to foreclose entry of an Order unless three very stringent conditions are met. Those are the positions that the Commission ruled proper in that regard. Section 11 and Section 5 are the two Sections providing for the Commission's jurisdication and remedial power. Both of those sections provide that when the Commission finds a violation it shall enter an Order. Now certainly the Commission is vested with broad discretion as to the scope of that Order, as to the nature of that, but the language is clear. The Commission shall enter an Order.

Now, at the very least that establishes a presumption of favor in granting in Order. That has certainly been practiced throughout the history of the Commission's cases.

Now, also to the "rid itself" allegation of threat

of future violations which SCM has alleged was lacking in the Complaint in this matter, we would point out we looked through the Complaints and never in any FTC Complaint and Order have we seen a provision or allegation that there was a threat of recurrent violations. We must conclude from that, that such an allegation is unnecessary to the Commission's jurisdiction to enter an Order.

Again, particularly in light of the language of Sections 5 and 11 that the Commission shall enter an Order, we would also point out the Concentrated Phosphate case cited in our brief, in which the Supreme Court, referring to a question of mootness, deciding that a case was not moot, went on to say: "Of course, it is still open to appelles to show that the threat of future violations is sufficiently remote to establish that no relief is necessary."

So even the Supreme Court, in its own discussions and in its own recognition of the existence of the Grant case, has not taken the position with respect to the granting of equable relief that SCM contends is the correct view on this matter.

Turning then to the issue of whether SCM Corporation is subject to Section 8, Section 8 provides that no person shall be at the same time a Director in two or more corporations.

Now, the only way that a person can be a Director

of a corporation is if the corporation, through its stockholders, makes him a Director. Therefore, clearly the language of Section 8 commands the corporations to keep such persons off of their Boards of Directors.

Section 11 bolsters the view that the Commission's authority under Section 11 extends to the corporation found to have violated the law. The language given is, "The Commission shall enter an Order to cease and desist and rid their Boards of Directors chosen contrary to Section 8.

SCM has cited the original language of Section 8, which has provisions dealing with certain banks. However, we would like to point out those provisions dealing with certain banks were not restricted only to the Directors of those banks, but to other employees and to officers as well, officers and other employees as well.

Now, then, if Section 8 has been specifically tailored to the power of the Federal Reserve Board it syems that Section 11's language would have been parallel, that the requirement would have said: To rid their Boards of the Directors, officers and other employees.

We submit that because Congress used the language "rid their Boards of Directors", and did not go any further than that, that Congress had in mind the Federal Trade Commission's jurisdiction under Section 8 as well as any jurisdiction that the Federal Reserve Board might have had

under Section 8.

COMMISSIONER CLANTON: May I interject here?

Let's say you were to construe Section 8 by itself without looking at Section 11 as applying only to individuals with respect to violations of the interlocking directors rule, would you then still say that Section 11 would be sufficient from a statutory construction standpoint to bring corporations in, or is it only valid for taking action against corporations solely for remedial purposes?

In other words, I understand you to say Section 8, without looking at Section 11, is sufficient to reach the corporation?

MR. HECHTKOPF: Correct.

COMMISSIONER CLANTON: If it were not, if it included Section 8 by itself and did not reach the corporation, Section 11, certainly the language on its face in Section 11 appears to apply to corporations -- at least that is a reasonable interpretation, one of perhaps other reasonable interpretations, and is Section 11 sufficient then to bring a corporation in, one, for purposes of finding violations, or, two, only for purposes of relief?

MR. HECHTKOPF: Section 11, or the language of Section 11 is it our position manifests what Congress's intent was in its language set forth in Section 8. The language of Section 8, as I said, it is open to interpretation, clearly

open to interpretation the corporation is subject to it. It Section 11 makes it clearer that Congress did intend to reach the corporation.

COMMISSIONER CLANTON: You are not restricting it to Section 11?

MR. HECHTKOPF: No. Section 11 is merely a guide to the interpretation of Section 8.

COMMISSIONER DIXON: You would have no power without Section 11. It is the empowering section of the Act. It tells you those things we can't do. After eliminating other tings, everything else is here at this agency and when you read Section 18 it is the Department of Justice there as well.

MR. HECHTKOPF: Our position is that Section 8, is that Section 11 does establish the jurisdiction, but the terms, reading it together, demonstrates what Congress intends. Also, we would note that SCM's reading of Section 8 is terribly restrictive and when you consider Section 8 it is a remedial statute designed to reach a condition which was rampant, the condition of interlocking directors, designed to reach that remedy and eliminate that as a means of foreclosing competition and eliminating competition. In view of this remedial purpose, the Section should be broadly construed and, certainly, as I say, there is every reason to give it the interpretation that it does reach the corporations, particularly since there is no way to have somebody

be a director without him being made a director by a corporation.

Now, even if Section 8 is not applicable, certainly Section 5 is. The case of Federal Trade Commission versus Grand Union, a case dealing with the Robinson-Patman Amendments to the Clayton Act, is certainly analagous to the situation before us.

There there were certain payments solicited by Grand Union. The parties from whom the payments were solicited were prohibited from making those payments under Section 2(D) of the Clayton Act, Robinson-Patman portion thereof. The Commission was upheld in holding that Section 5 would reach that particular practice of soliciting these payments, even though nothing specifically provided for liability. The Court noted that the Commission was doing no more than perhaps expanding the jurisdiction, but the Commission had not created any new offense, had not declared unlawful other conduct which had been lawful.

The same situation applies here even if Section 8 is not applicable to corporations, for the sake of argument Section 8 declares the interlocking directorate to be unlawful in itself. It is a per se violation. Certainly when the Federal Trade Commission acts to prevent interlocking directorates and enters an Order against the corporation in the absence of some showing that Congress intended to favor

corporations and allowed them to engage in conduct that was forbidden to the other necessary parties to the conduct, we have the same kind of situation here as in Grant, if the director cannot serve certainly the corporation has no right to make him a director of the corporation.

Therefore, the policy of Section 8 is carried out when Section 5 is used to bolster it in that manner.

Also, the argument has been made that Section 5 requires some showing of an actual competitive effect. That same issue was reached in the Grand Union case where the Court said that the Robinson-Patman Act, Section 2(D) provided for a per se violation and that the same rule would apply where Section 5 was used to bolster it. By analogy, the same situation applies here. Certainly there is no need to show during the 8 years, if Kraftco and SCM were interlocked, about $351 million worth of competition, there is no need to show that some anticimpetitive effect occurred. All that is required is a showing that the interlock in fact existed.

COMMISSIONER DIXON: The fact is the proof was not produced. There was no such competitive agreement reached or flowing from the interlock and if there was no agreement which flowed from the interlock it would make no difference.

MR. HECHTKOPF: That's correct.

COMMISSIONER DIXON: The language is, "There might".

And the words are "There might".

MR. HECHTKOPF: Unless there are questions, I have nothing further.

CHAIRMAN COLLIER: Mr. Willis.

MR. WILLIS: Since you gave me my 45 minutes already, I will be brief and make one point.

Complaint Counsel were very courteous to give me before the argument the copy of the Indian Arts case which just came down this week, and I was not familiar with it.

I think, and I submit, that it really supports the kind of approach we are talking about here. There, looking at the special circumstances of that case, this Commission felt that no order was needed. What I am suggesting is if we start looking at this case from the Supreme Court's Opinion in the W. T. Grant case, it says: That moving party must satisfy the Court that relif, meaning further relief, is needed. The necessary determination is that there is some cognizable danger of recurrent violation.

I submit that on the record before us here today that that standard is not met. That the objective of Section 8 has been met by the resignation of Mr. Bond. There is nothing that suggests that SCM, which has at one time in its fifty hear history had the interlocking director problem, will do it in the future and in view of that there is no need under the circumstances of this case for any

prospective injunctive decision.

COMMISSIONER DIXON: Before you leave, Mr. Willis, and I followed very closely how you got here and why you say you got here, and you were here and filed your papers and made your arguments and do you think it would be in the public interest for the Commission, as a matter of fairness, to give you as close an Order, if an Order is deemed necessary, as the Order is in the Kraftco --

MR. WILLIS: Yes, Mr. Commissioner. It seems to me that if, as I said at the outset, if any Order is required here, and I urge that you give consideration as to whether or not any is required, it certainly should be no more burdensome than that which you already agreed for Kraftco.

COMMISSIONER DIXON: You don't think basically there is any fairness in saying that because they gave up earlier and you caused a lot of expense and effort in getting yourself here, that you should be treated differently?

MR. WILLIS: No. I think the kind of injunctive relief that is imposed should be based upon the nature of the violation. The procedural matters within the Commission ought not to affect that.

COMMISSIONER DIXON: There is a little difference in what we are talking about after we get over as to whether you should have even been sued or not as a corporation. After we get over that, we get to the nitty gritty and what

came out from the Kraftco Order was only a limited number of products, not all products, and there were time limitations as to how long you had to be under the cloud of compliance, running the risk of penalty. We are talking about an expensive penalty if you flunk again.

MR. WILLIS: That's correct.

What I am submitting here in this case is and, of course, there was no violation continuing, but we are talking that the violation was over within a few days.

COMMISSIONER DIXON: You don't think the Commission carries a burden to give you the full works, that is permanent, in perpetuity against this happening again which puts you under a cloud of having to pay a substantial penalty if you do?

MR. WILLIS: What I am saying is I don't think it is appropriate.

COMMISSIONER DIXON: Do you think the Commission has to have a predicate for that, you mean a factual predicate?

MR. WILLIS: I think that is what the Supreme Court of the United States stated in W. T. Grant.

COMMISSIONER DIXON: The Supreme Court has to follow the statute and the statute says to issue a cease and desist and it does not say for one year, four years or five years. If the Commission in its wisdom wishes to do it, the Court will not hit us on the head and say, "You were

not tough enough."

MR. WILLIS: I think so. I think the Court or SCM or any party deserves from the Commission that it look at the facts and decide on the basis of my case, SCM, looking at me as an individual, my case, what is required with respect to me.

I am a first time offender. It was a small amount of overlap. It was ended immediately. Under all of those circumstances, is this kind of relief required?

Now, if, in your wisdom, you conclude that it is required, certainly --

COMMISSIONER DIXON: We don't have to explain why we write an order in perpetuity to cease and desist forever. We don't have to explain why we do that. We might have to explain why we don't require all of that if we say in this case we are not going to go that far to require all of them.

MR. WILLIS: Mr. Commissioner, a few years ago I was sitting in a Court in the Southern District of New York before Judge Winefield, who I think you know very well, one of the defendants argued in favor of a lighter sentence because of the fact that he had pleaded guilty and saved the Court the time and expense of prosecuting the case. Judge Winefield leaned over the Bench and said: "That is what this Court is here for, is to give you opportunity for trial," and he said --

COMMISSIONER DIXON: "They are here to dispense justice, not time."

MR. WILLIS: That is what I am asking from the Commission.

CHAIRMAN COLLIER: This hearing is concluded.

(Whereupon, at 4:30 p.m., the hearing was concluded.)

CERTIFICATE OF SERVICE

Service of a copy of the annexed appendix was made upon the Respondent herein by placing same in the United States mail, postage prepaid, this 27th day of May, 1977 directed to:

David C. Shonka, Esq.
Federal Trade Commission
Washington, D.C. 20580

George A. Scholze

George A. Scholze
48 Wall Street
New York, N.Y. 10005
952-8100